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REVISED BY

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PREFACE.

We owe an apology to our subscribers for the long delay that has occurred in bringing this first volume of the Reprinted Edition of the Madras Law Journal. The large demand for the back volumes of the Law Journal is a sufficient justification for a reprint. It has, however, been thought that it will be more useful to the profession if the journal matter be revised in the light of recent cases and as this means a somewhat large addition to existing matter and a careful editing, the work of reprinting necessarily takes sometime. The Translation of Smritis have also undergone careful revision. There has been some delay in consequence of a change of press due to the old printers not being able to cope with the work. The second volume of the Reports has been made ready and issued along with the remaining portion of the first volume now made ready.

It need hardly be stated that the Reports have been restricted to cases not appearing in the authorized reports except a few which have been thought useful for the report of the arguments. It has also been thought useful to note how the cases have been dealt with subsequently.

We have now made special arrangements for the speedy issue of the Reprint Volumes.

We hope to be able to push on the further Volumes of the Reprint Series rapidly.

P. R. GANAPATHI AIYAR.

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The Madras Law Journal

(REVISED.)

Volume I—1891.

OURSELVES.

The prospectus briefly indicates the objects of this Journal. The publication of such a periodical has been strongly urged upon us by many of the leading practitioners of the Madras High Court. The practice of citing unreported decisions has become very common now. The selection of the cases to be reported is practically in the hands of the Law Reporter and he, in the exercise of the discretion vested in him, selects such cases as he thinks deserve to be reported. But there still remain many decisions unreported, some of them considered judgments, which deal with important questions of law and practice, but which never see the light of day, being thrown away into that 'waste-paper basket,' if one may so call it—the record-room of the High Court. We wish to save a large number of these decisions from becoming food to white ants. We have also heard complaints of the meagre way in which the arguments of the pleaders on both sides are reported at present. Perhaps this is not altogether the fault of the learned Reporter, who, a busy practitioner himself, cannot find time to take notes of the arguments in every case of importance.[1] We have made arrangements for getting complete notes of the arguments in all important cases. We take this opportunity to state that our object in starting this journal is not to prejudice in any way the circulation of the "Indian Jurist" which, so far as we are aware, is the only legal journal published in India. The field of law is so wide, and there are so many questions which admit of being discussed from different points of view, that we think there is ample room for the

[1. The Reporter now-a-days is scarcely to be seen in any of the courts for taking arguments :—ED.]

existence of both the journals. Further, the work which we have cut out for ourselves is not exactly the same as the work which the "Indian Jurist" is now doing. In addition to giving our own reports of the decisions of the High Courts in Madras and other places, we hope to place before our readers translations of various Hindu Law books, which remain yet untranslated, in so far as they have any bearing on questions which practically arise for decision every day in our Courts of Justice. We
[2*] propose * further, from time to time, to place side by side the conflicting decisions of the various Courts in India on the same point in the hope that such procedure will enable the Courts to act in greater harmony than they do at present in the interpretation of Acts and enunciation of general principles of Law and, when this is not possible, enable the Legislature to bring about such harmony by removing the ambiguities which may have given rise to such discordant views. These objects cannot be carried out without the strong support of the various branches of the legal profession here and elsewhere. We sincerely trust that we shall get such support in this undertaking, the main object of which is to further the interests of justice.

The Succession Certificate Act.

We propose to note briefly some of the defects in the Succession Certificate Act VII of 1889.

(i) S. 4, Sub-S. (i), provides that no Court shall "pass a decree against a debtor of a deceased person, for payment of his debt to a person claiming to be entitled to the effects of the deceased person or to any part thereof, except on the production by the person so claiming, of a certificate granted under this Act, and having the debt specified therein, or a certificate or probate or letters of administration under the other acts relating to succession." There is no provision in the Act for staying proceedings in any Court in which a suit may be brought for any of the debts in respect of which a certificate is required, pending the final disposal of any application for a certificate which may have been made to the District Court. The consequences of the absence of such a provision may be serious, especially in those cases where the District Court refuses the application

[* The corresponding page of the old edition is given in the margin.—ED.]

for a certificate or grants it to the wrong party and an appeal has to be preferred to the High Court to set things right. If the Court in which the suit for debt is brought dismisses it on the ground that no certificate is produced within a reasonable time, as it would often be tempted to do owing to its having to submit quarterly and annual returns of cases remaining undisposed of, and an explanation for any long delay in disposing of them, the parties would be put to a good deal *of hardship and inconvenience. [3 *]

(ii) The Act further makes it compulsory that in all cases a certificate shall be produced. But supposing that the debts to be collected are petty sums not exceeding in all twenty or thirty rupees, the expense to be incurred for procuring such a certificate would often exceed that sum and the practical effect of the law as it stands now would be to leave it optional to the debtor to pay or not pay such sums, as the words 'no court' would apparently include Village Munsifs' courts also.[1]

(iii) S. 14 of the Act states that every application for a certificate must be accompanied by a deposit of a sum equal to the fee payable under the first Schedule to the Court Fees Act, 1870, in respect of the certificate applied for. We think that it is rather hard that a person who is not even sure that a certificate will be issued in his name should be called upon to deposit this sum with his application.[2] It will be no hardship, if he is called upon to do this, after an order for the issue of a certificate in his name has been passed. No doubt, the law as it formerly stood was amended, because, in some cases parties who had obtained orders never paid the proper stamp duty or took out a certificate. But the Legislature could have remedied this evil by enacting that no such order shall be issued by any Court until the necessary deposit has been made. The present law would work great hardship in the case of pauper applicants who may not find it easy to procure the necessary deposit before any order is passed in their favour.

(iv) The wording of the Act still leaves in doubt whether a member of an undivided Hindu family is entitled to sue on behalf of the family on bonds executed in the name of the last manager without obtaining a certificate. The Hon. Mr. Hutchins stated,

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[1. See *Rasibi Ammal* v. *Olaga Padayachi*, (1897) I.L.R. 21. M. 115 :—ED.]

[2. It will be some redeeming feature if the depositor is entitled to a refund when no order is made in his favour:— Cf. *Sankara* v. *Nainar*, (1897) I. L. R. 21 M. 241 :—ED.]

when the bill was under discussion that a Hindu son succeeding by right of survivorship on the death of his father, is not bound to take out a certificate under the Act, but the Madras High Court has held, that it is only in those cases, where, on the face of the bond, it appears that the money was advanced out of the family funds for the benefit of the family, that the production of the certificate is not necessary.[1] (We are aware that recently Mr. Justice *Best* sitting as a single Judge took the view[2] that the production of the certificate is not necessary where a Hindu son seeks to execute a decree obtained by his father but the previous [4 *] decision of a bench composed * of two Judges was not brought to his notice).

(v) There is one more defect to be referred to. The Act applies only to the mofussil districts presided over by District Judges. It does not apply to the Presidency towns which are within the ordinary original jurisdiction of the various High Courts.

* * [The view that the Act does not apply to the Presidency towns which are within the ordinary original jurisdiction of the High Courts must be taken with some qualifications. S. 1, cl. 3, enacts that the Act extends to the whole of British India. The prior Act which this Act (VII of 1889) repealed, viz., Act XXVII of 1860, was held to be applicable to the Hindus within the Presidency towns. *Muthammal* v. *Bank of Madras.*[3] There can be no question that the prohibition in S. 4 applies also to the Courts within the Presidency towns. But apparently an application under S. 6 for a succession certificate under Act VII of 1889, an only be made to the District Court, and the District Court under S. 5 has jurisdiction to grant a certificate under the Act in cases

* * New matter introduced is indicated throughout by square brackets thus [ ].

1. Ref. case 23 of 1889. [Since reported as *Venkataramanna* v. *Venkayya,* (1890) I. L. R. 14 M. 377. The view entertained in this case does not hold good now. The Madras High Court in more recent cases has held that the nature of the debt need not appear on the face of the bond but that it may be shown by other evidence, and the same view prevails in the other High Courts. See *Subramaniyam* v. *Rakku,* (1897) I. L. R. 20. M. 232 ; *Pallam Raju* v. *Bapanna* (1899) I. L. R. 22. M. 380 ; *Pertap Narain Singh* v. *Bhagwati Persad* (1895) I. L. R. 17. A 578 ; *Jagmohandas* v. *Allu Maria,* (1894) I. L. R. 19 B. 338 ; *Beejraj* v. *Bhyro Prasad,* (1896) I. L. R. 23 C. 912; and *Basanta Lal* v. *Parvati,* (1903) I. L. R. 31 C. 133. :—ED.]

2. C. R. P. 27 of 1890.

3. (1883) I. L. R. 7 M. 115.

where the deceased ordinarily resided at the time of his death within the jurisdiction of such District Courts, or, if the deceased had no fixed place of residence at that time, where any part of his property is found within such jurisdiction. The District Court is defined in other Acts as the principal court of civil jurisdiction in the District. But in this Act S. 3 defines a District Court as a court presided over by a District Judge so that the view taken in this article is correct to the extent that no application for a succession certificate under the Act can be made to the High Court.—ED.]

If a person, being a resident of the Mofussil, dies a certificate under the Act may be obtained in respect of the debts only. But if he ordinarily resided in one of the Presidency towns, the person entitled to recover his debts is forced to obtain letters of administration of the whole estate and pay the stamp duty calculated on the value of the whole estate. There seems to be no reason apparently, for this distinction, and it would have been well if provisions similar to those applicable to a person who resides out of the Presidency towns at the time of his death, had been made in regard to persons dying in the Presidency towns.

A Retrospect of the English Law Reports for 1890—I.

Civil Procedure :—We propose to review briefly the English Law Reports for 1890. We shall begin with the Indian Appeals. There are a few decisions on the Code of Civil Procedure which deserve to be noted. Curiously enough the Indian Courts and the English Court of final appeal do not seem to agree as to the principles by which they are to be guided in putting a liberal or a narrow construction on the sections of the Code. The Indian Courts put a wide construction on sections relating to their own jurisdiction, as for instance, their powers of revision under S. 622 where there is no appeal, and their powers under S. 584 in the case of second appeals. In regard to both these cases, the Privy Council acts on the principle that where discretion is given by the Legislature to a subordinate Court, the High Court ought not unduly to interfere with the exercise of that discretion—*Amir Hassan* v. *Baksh Singh* ; [1] *Mahammad Yusuf* v. *Abdul Rahman* ;[2] and

1. (1884) I. L. R. 11 C. 61 : S. C. L. R. 11 I. A. 237.
2. (1889) I. L. R. 16 C. 749 : S. C. L. R. 16 I. A. 104.

Durga Choudhrain v. *Jawahir Singh.* [1] It is on this principle that the English Courts act in the exercise of their right of supervision of the acts of judicial or quasi-judicial bodies (see the recent case of *The Queen* v. *Bishop of London.*[2])

[5 *] * On the other hand where justice is likely to suffer by a rigid adherence to the literal meaning of the various sections of the Code relating to procedure, the Privy Council, differing in that respect from the Indian Courts, puts a broad and liberal meaning on the words. In the section for instance relating to reviews, the Privy Council construed the words 'or for any other sufficient reason' in a broad sense—*Reasut Hossein* v. *Abdoolla.* [3] Similarly in construing S. 549 of the Code which specifies a time within which security for costs shall be given, the Privy Council over-ruling the Calcutta High Court holds that the Court has power for proper reason shown (*Modhusudan* v. *Prapanna*[4]) to extend the time for giving security whether the application for such extension is made before or after the time allowed has expired—*Budri Narain* v. *Sheo Koer.*[5]

Hindu Law:—The Privy Council has decided one or two interesting questions of Hindu Law. The much vexed question of the liability of a son for his father's debts is now set at rest by the sensible view taken by the Privy Council that the son is liable unless he shows that the debt was incurred for an illegal or immoral purpose—*Mahabir Persad* v. *Markunda Nath.*[6] The question in what cases a zemindary may be considered impartible is becoming a vexed one now. The Privy Council rightly holds that it is a question of fact and that each case must be decided according to

1. (1890) I. L. R. 18 C. 23 : s. c. L. R. 17 I. A. 122.
2. (1890) 24 Q. B. D. 213.
3. (1876) I. L. R. 2 C. 131 (140, 141) : s. c. L. R. 3 I. A. 221 (229).
4. (1889) I. L. R. 17 C. 516 : s. c. L. R. 17 I. A. 9.
5. (1889) I. L. R. 17 C. 512 : s. c. L. R. 17 I. A. 1 [See also *Jumnabai* v. *Visson Das*, (1897) I. L. R. 21 B. 576. Cf. the cases as to the power of the High Court, to grant extension in sanction cases under S. 195, Cr. P. C.—*Mathukudam Pillai In re*, (1902) I. L. R. 26 M. 190 (191); *Karuppana Servagaram* v. *Sinna Goundan* (1902) I. L. R. 26 M. 480. But see *Kali Kinkar Sett* v. *Dinobandhu Nandy* (1905) I. L. R. 31 C. 379 (385) reversing the judgment of Mr. JUSTICE HENDERSON in *Dinobandhu* v. *Hurrymutty* (1904) 8 C. W. N. 797. See also cases of extension of time for payment of redemption amount. *Vedapurathi* v. *Vallabha Rajah* (1902) 25 M. 300 ; *Iswar* v. *Lingo* (1903) 28 B. 102. ; *Ranjo* v *Bohihetti* (1901) 3 Bom. L. R. 554 :—ED.]
6. (1889) I. L. R. 17 C. 584 : S. C. L. R. 17 I. A. 11

the evidence given in it. But unfortunately the Indian Courts and the English Court do not seem to agree as to what shall be considered as sufficient evidence to prove impartibility. In the latest case reported (*Mallikarjuna* v. *Durga*[1]) the Privy Council held, reversing the decision of the Madras High Court, that the evidence showed clearly that the zemindary in question was an impartible one.

The exact position of an illegitimate son in a Sudra family is still left unsettled. But in the recent case of *Jogendro Bhupati* v. *Nityanund Man Singh*[2] the Privy Council has held, confirming the decision of the Calcutta High Court,[3] that an illegitimate brother is entitled to succeed to a Raj by right of survivorship to his legitimate brother though the latter has left behind him three widows and a daughter by one of them. The decision of the Bombay High Court in *Sadu* v. *Baiza*[4] to the effect that in an ordinary Hindu family belonging to the Sudra caste and holding partible property an illegitimate brother takes * the estate as a [6*] co-parcener succeeding by right of survivorship on the death of his legitimate brother to the exclusion of the widow and daughter of his father is followed.

As it is an important decision we shall examine the successive steps by which the Privy Council has arrived at this conclusion. Following its decision in the *Shivaganga case*[5] it holds that in considering who is to succeed on the death of a Raj the rules which govern the succession to a partible estate are to be looked at. It then quotes the passages from the Mitakshra, Ch. I, S. 12, dealing with the rights of a son by a female slave in the case of Sudras and interprets them as showing that though in the life-time of the father an illegitimate son does not acquire any right to share in the estate in the same way as a legitimate son would do, still, after the death of the father, a co-parcenary is created between the son of the wedded wife and the son of the female slave, and as, in case the illegitimate brother dies before partition between himself and his legitimate brother, the latter would apparently succeed by right of survivorship, there is no reason for holding that the illegitimate brother would not take by

1. (1890) I. L. R. 13 M. 406 : S. C. L. R. 17 I. A. 134.
2. (1890) I. L. R. 13 C. 51 : S. C. L. R. 17 I. A. 128.
3. *See* (1885) I. L. R. 11 C. 702.
4. (1878) I. L. R. 4 B. 37.
5. *Sub-Nominee, Katama Nachiar* v. *Raja of Sivaganga*, (1863) 9 M.I.A. 543.

survivorship in the case of the death of the legitimate brother, as in both the cases the right must be the same. The Privy Council by implication rejects the theory that there can be co-parcenary only between persons who have acquired an interest in the family property at their very birth. Though the Privy Council does not refer to any Madras decision in regard to the position and rights of illegitimate sons, the Calcutta Court refers to the case of *Krishnayyan* v. *Muttusami*[1] in which the facts were as follows: *V* and *S* were two undivided brothers of the Sudra caste. *V* died before *S* leaving behind him two illegitimate sons. *S* subsequently died leaving two widows. The Madras High Court held that the illegitimate sons did not on the death of their father succeed to his undivided interest, but that the whole interest passed by right of survivorship to *S* on the death of his brother *V*, and that on the death of *S*, his widows, and not his illegitimate nephews, were entitled to succeed to his property, because there was no sapinda relationship between *S* and his illegitimate nephews, which relationship must be founded on legal marriage. The Calcutta Court, after some hesitation, came to the conclusion that there was probably no
[7*] conflict * between this decision and their own decision. In two later decisions *Ranoji* v. *Kandoji*[2] and *Parvati* v. *Tirumalai*[3] the same question was discussed by the Madras High Court, and it approved and followed the decision in *Krishnayyan* v. *Muttusami*.[1] In the case of *Parvati* v. *Tirumalai*[3] the decisions of the Bombay and Calcutta High Court are referred to and distinguished on the ground that in those cases there was no competition between the illegitimate son and the father's undivided brother. Till, however, the matter goes up to the Privy Council and an authoritative ruling is given by their Lordships, the matter cannot be considered as finally set at rest. We may, however, take it for the present that the following propositions of law can be deduced from the decided cases:—

(*a*) Where one of the members of an undivided Hindu family of the Sudra caste consisting of two or more co-parceners dies leaving only illegitimate sons, the said sons do not become co-parceners with the other members of the family but are only

1. (1883) I. L. R. 7 M. 407. [It would appear from the arguments of the appellant's counsel in the P. C. case at p. 130 of the report L. R. 17 I. A. that this Madras case and the case of *Ranoji* v. *Kandoji*, (1885) I. L. R. 8 M. 557 were before the Privy Council :—ED.]

2. (1885) I. L. R. 8 M. 557.

3. (1887) I. L. R. 10 M. 334.

entitled to maintenance. Cf. *Ramalinga Muppan* v. *Pavadai Goundan*.[1]

[This seems to follow as a logical result from the principles recognized by the texts bearing upon the matter and the decided cases. In Mitakshara, Chapter I, Section 12, placitum 2, it is stated :[2] "However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife nor sons of daughters. But, if there be such, the son of the female slave participates for half a share only." It has been held in the *Shivaganga case*[2] that the separate property of a Hindu, whatever be his status, whether divided or undivided, would go in the absence of issue to the widow to the exclusion of the surviving undivided brothers of the deceased, and this principle was followed by the Judicial Committee in the *Gungore case*,[3] so that according to the text already cited, the illegitimate son would take his putative father's separate property to the exclusion of the father's undivided brothers or uncles, and would share with the widow, daughter and daughter's sons. In *Ramalinga Muppan* v. *Pavadai Goundan*[1] it was held that the legitimate son of an illegitimate son would represent his father and would be entitled to take the property of the illegitimate son's putative father who had died divided from his brothers. But, as we have already said, division or no division is not the test. The only test is whether the property is separate or self-acquired.

It seems now to be settled, so far, at any rate, as the Madras High Court is concerned, that an illegitimate son is not entitled to claim any share in his putative father's joint property if the father died leaving his undivided brothers or uncles and their sons, see *Karuppa Goundan* v. *Kumarasami Goundan*[4] and *Ramalinga Muppan* v. *Pavadai Goundan*,[1] though in the same case at p. 523 Mr. JUSTICE BHASHYAM IYENGAR leaves the question as to whether the view taken by the Madras court on this matter is affected by the decision of the Privy Council, open. However, this view was apparently affirmed in *Gopalasami* v. *Arunachellam*.[5] Where the father died leaving legitimate and illegitimate sons, the illegitimate sons would be entitled to claim a share as against the legitimate

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1. (1901) I. L. R. 25 M. p. 519 at p. 522. 2. Stokes H. L. 426.

3. *Sub-nominee: Chintaman Singh* v. *Nowlukho Konwari* (1875) 2 I. A.p. 263 s. c. I. L. R. 1 C. 153.

4. (1903) I. L. R. 25 M. 429 at p. 430. 5. (1903) I. L. R. 27 M.32 at pp. 35-36.

sons—*Thangam Pillai* v. *Suppa Pillai.*[1] The question whether an illegitimate son would be entitled to claim a share when the father died leaving his undivided brothers or uncles arose for decision in *Gopalasami* v. *Arunachallam*[2] where it was decided that the illegitimate son would not be entitled to claim a share under such circumstances. In the same case, the Madras High Court construed the text of the Mitakshara, Chapter 1, Section 12, as applying to a case where the father dies divided from his brothers or uncles and as having no application to the case of a father dying undivided from his lineal ancestors, brothers or other collaterals, so that the fact that the father died leaving legitimate and illegitimate sons would not be a ground of itself for the claim of an illegitimate son to a share. If, at the time of the fathers' death, there were his undivided brothers along with his undivided legitimate sons, his illegitimate sons would not be entitled to claim a share, and the fact that the legitimate sons obtained their shares of the joint family property from their uncles after the death of the father would not give the illegitimate sons any right to claim a share in such property.—Ed.]

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(*b*) Where a divided Hindu father of the Sudra caste dies leaving legitimate and illegitimate sons they become co-parceners and the law of survivorship attaches to the estate inherited or jointly acquired by them.

It would seem to follow from these two propositions (*a*) and (*b*) that even in the case of an undivided Hindu family the illegitimate sons of the members would be entitled to succeed in preference to the other co-parceners to their separate property, though we are not aware of any case which has decided this point.

There is a third proposition of law which the Madras High Court has laid down and it is this. If there is a competition between the widow and the illegitimate sons of a Sudra who has no co-parceners the former is entitled to succeed in preference to the latter. The Bombay High Court takes the opposite view. We shall discuss this question in our next issue.

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1. (1888) I. L. R. 12 M. 401 at p. 403. 2. (1903) I. L. R. 27 M. at pp. 35, 36.

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RES JUDICATA BETWEEN CO-DEFENDANTS.

*I propose to make a few remarks with reference to the scope and limits of the doctrine of *res judicata* between co-defendants. The question to be considered may be stated thus: *A* brings a suit against *B* and *C*. How far is the determination of the suit by *A* binding as between *B* and *C* in a suit by *B* against *C* or *vice versa*? No definite answer can be given to the question put in this general form. Various circumstances have to be considered before arriving at any conclusion about it. It cannot be contended that in no case, can a judgment in a suit by a plaintiff against two or more defendants determine their rights *inter se*. It cannot also be contended that a judgment in a suit makes all questions raised in it *res judicata* as between the defendants. Before proceeding to consider the conditions necessary for the application of the doctrine of *res judicata* between co-defendants, it may be mentioned that very little information is available on this subject in the books written by the American and English Text writers. Bigelow, the American Text writer, in dealing with Estoppels by Record, devotes only one short paragraph to this subject, and the views expressed by him therein are by no means clear and accurate.[1] I find no reference to this subject in the work of the English Text writers, Everest and Strode; nor is there any mention of it in the note to *The Duchess of Kingston's case* contained in Smith's Leading Cases.[2] There are, however, a few English decisions which throw light on the subject, and it has been, frequently, discussed by the Courts in India, though, it must be admitted, there is considerable difference of opinion among the judges who have had occasion to consider it. [8*]

S. 13 of the Code of Civil Procedure deals with the law of *res judicata*, and the material portion of the section is as follows:—" No Court shall try any suit or issue in which the matter directly and substantially in issue *has been directly and substantially in issue* in a former suit between *the same parties* in a court of competent jurisdiction and has been heard and finally decided by such Court." It is here stated that the parties to the subsequent suit must be the same as in the former suit. It is therefore immaterial whether, in the former suit, they stood

[1. See. Bigelow on Estoppel (5th Ed.) pp. 114, 127:—Ed.]

2. Sm. L. C. Vol. II. 731 (11th Edn.) [The subject is discussed in Hukum Chand's " Res judicata " paras 77 and 78, pp. 170 to 177:—Ed.]

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together in the same array or not, but to lay the foundation for the operation of the doctrine of *res judicata*, it is necessary that they should, as a fact, have been opposed to each other. There [9*] should* have been a real conflict of interests between the co-defendants, and the matters in dispute between them must have been in issue in the former suit. In this connection it will be necessary to remember that, even though the matters in dispute between the co-defendants were not *formally made* the subject of an issue or issues, yet it is sufficient if they were *really* in issue; and it may not also be out of place to state that it is often difficult to find out from the records of a suit, which of the parties joined issue on which of the points raised in the suit. The former practice, which exists in some Courts even now, of the Judge recording distinctly which of the parties affirms and which of the parties denies the matter in issue is not only commendable but will also obviate some of the difficulties which are attendant on the application of the doctrine of *res judicata* between co-defendants. The co-defendants should, further, have had an opportunity of adducing evidence on the points in issue which formed the subject of controversy between them, and there should have been a hearing and decision on the points in issue between them; in other words, there should be a judgment defining their mutual rights and obligations in respect of the matters in issue between them.

But the further question arises whether the doctrine of *res judicata* can be considered to apply indiscriminately to the determination of all the issues that were raised and decided in the former suit between the co-defendants. On the one hand, it may be argued that, as the object of the former suit was primarily to consider what relief should be given to the plaintiff in that suit and as it was only with reference to the relief to be given to the plaintiff that it was necessary for the Court to hold an inquiry into and define the rights and obligations of the defendants *inter se*, the doctrine of *res judicata* should be limited in its operation to those cases where the adjudication between the co-defendants is necessary to give the appropriate relief to the plaintiff.[1] On the other hand, it may be

[1. It has been held by a Full Bench of the Madras High Court in *Somasundara* v. *Kulandaivelu*, (1904) I. L. R. 28 M. 457, that the defendant must be interested in the relief to be granted to the plaintiff and that otherwise there can be no *res judicata*. That was a case of co-owners. One of the co-owners brought a suit for his share and obtained decree. It was held that the other co-owner could not take advantage of it as *res judicata*. See also the other cases cited in p. 16 note (8) *infra*—ED.]

contended that though the former suit was one instituted by the plaintiff, yet, inasmuch as the Courts are bound to adjudicate upon and settle effectually all questions raised between the parties so as to leave no room for further litigation, and the co-defendants chose to join issue on certain matters and the Court came to definite conclusions on those matters, those conclusions ought to have the force of *res judicata* notwithstanding that it subsequently turned out that it was unnecessary to* arrive at those conclusions, [10*]
having regard to the termination of the plaintiff's suit. To take an illustration; suppose *A*, *B* and *C* laid claim to the same property, each claiming under a different and inconsistent right, and *A* brings the suit against *B* and *C* for the property and issues are joined not only between *A* on the one hand and *B* and *C* on the other hand, but also between *B* and *C* *inter se* and there are findings arrived at with reference to the rights set up by *B* and *C*, and the right of *A* to the property is negatived, can it be contended that though *A* lost the suit on the ground that his right was not made out and it was, therefore, unnecessary to discuss the rival claims of *B* and *C*, yet the adjudication in the suit by *A* of the claims of *B* and *C* prevents them from disputing the correctness of it in a subsequent suit between them? In *Venkayya* v. *Narasamma*[1] the Judges appear to hold that under the abovementioned circumstances the doctrine of *res judicata* applies between the defendants *inter se*. The subject is by no means free from difficulty, but I am inclined to attach more weight to the observations of Mr. JUSTICE WEST in the case of *Ramachandra* v. *Narayan*,[2] where he refers to the English case of *Cottingham* v. *Earl of Shrewsbury*,[3] and considers that the doctrine of *res judicata* between the defendants *inter se* applies only where the adjudication in the former suit was necessary to give the appropriate relief to the plaintiff in that suit.[4] In some cases there is no difficulty in applying the doctrine of *res judicata* between co-defendants, but in other cases there is considerable difficulty. Suppose *A* brings an interpleader suit against *B* and *C* under the terms of S. 470 of the Code of Civil Procedure, then it can hardly be doubted that the adjudication in the suit by *A* is final as between *B* and *C*. The interest of *A* is merely that of a

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1. (1887) I. L. R. 11 M. 204. 2. (1886) I. L. R. 11 B. 216.
3. (1843) 3 Hare 627 s. c. 67 Eng. Rep. 530.
4. [Cf. *Somasundara* v. *Kulandaivelu*, (1904) I. L. R. 28 M. 457.—ED.]

stake-holder and the suit which *A* brings is not only one in which the rights of *B* and *C* can properly be determined, but one in which their rights have necessarily to be determined for the purpose of giving relief to the plaintiff. Suppose, however, *A* brings a suit against *B* claiming certain property as the tenant of *C*, who is also made a defendant in the suit, and it is decided on the merits in *B*'s favour, and *C* then brings a suit against *B* for the property, is *C*'s suit barred[1] by reason of the
[11*] adjudication * in the suit by *A* ? Having regard to the foregoing observations, inasmuch as the interests of *B* and *C*, though they were co-defendants in the suit by *A*, were really conflicting, and the matter in issue in both the suits is the same, if it was raised between *B* and *C* in the suit by *A*, and *C* had the opportunity of adducing evidence upon it and there was an adjudication about it, there is no reason why such an adjudication ought not to be considered valid and binding between *B* and *C*. In the Full Bench case of *Brojo Behari Mitter* v. *Kedar Nath*[2] the Calcutta High Court is of opinion that even in this case the doctrine of *res judicata* does not apply and that *C* is entitled to bring another suit against *B* for the same property. But it is rather difficult to follow the reasons given for this opinion. The *first* argument to be found in the said decision is that though the former suit was brought by *A*, the tenant, against *B*, and *C* the landlord of *A*, the suit should really be viewed as a suit between *A* and *B* only. Of course if *C* was not made a party, any adjudication between *A* and *B* would not bind him; but where he was made a party and the issue is raised between him and *A* on the one hand, and *B* on the other, it is difficult to see how he can escape the effect of the adjudication on the issue. The *next* argument is that the conduct of the suit was not in *C*'s hands, and if *A* had abandoned the suit, it ought not to be held that *C* was

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1. [The decision in *Kandiyil Cheriya Chandu* v. *The Zamorin of Calicut*, (1903) I. L. R. 29 M. 515, apparently suggests an affirmative answer, but it is a question whether this decision is not to be treated as overruled by the F.B. case of *Somasundra* v. *Kulandaivelu*, (1904) I. L. R. 28 M. 457. It may be noted that although the report of the decision in *Kandiyil Cheriya Chandu's case* is later than the report of the decision in *Somasundara's case* the decision itself is earlier than the decision in the latter case. See also *Madhavi* v. *Kelu*, (1892) I.L.R. 25 M., p. 264, and *Zamorin of Calicut* v. *Narayanan Mussad*, (1899) I. L. R. 22 M. p. 323 (325)—ED.]

2. (1886) I.L.R. 12 C. 580.

barred. To this it may be replied,[1] that the conduct of the suit was as much in the hands of *C* as of *A*, the matter in issue having been raised not only between *A* and *B* but also between *B* and *C*. If *A* abandoned the suit, *C* is certainly not prejudiced, for the suit by *A* cannot then be considered to have been heard and decided. If *A* does not, however, abandon the suit, but adduces only some evidence, there is no reason why *C* should not supplement *A*'s case by adducing all the available evidence on the issue raised between *C* and *A*, the landlord and the tenant on the one hand, and *B* on the other. Then *the third and last* argument is that if it were held that *C*'s suit was barred, a person in the position of *C* would be helpless, for he would not be able to re-open his case or contest the order passed, by appeal to a higher Court.[2] The answer to this is that wherever it was possible for *A* to re-open his case or contest by means of an appeal, it was equally possible for* *C* to do so. The result of the examination of the [12*]
three decisions above referred to is that while the Calcutta High Court is not inclined to go so far as the Bombay High Court, the Madras High Court goes much further than the Bombay High Court in its view of the application of the doctrine of *res judicata* between co-defendants, and it will be probably found, that the true limits of the doctrine are those mentioned in the judgment of Mr. JUSTICE WEST in the case of *Ramchandra* v. *Narayan*.[3]

C. R. PATTABHIRAMA IYER.

[Apparently the subject-matter of this article has not been continued and is thus left incomplete by the late Mr. Pattabhirama Iyer. It was taken up by another writer in 11 M.L.J. but without anticipating our remarks in that connection, and without making any attempt to reconcile the several decisions we may here state briefly their effect. It may be taken as a well settled proposition of law that there may be issues arising for determination as between co-defendants, that a decision upon such issue may be *res judicata* as between then in a subsequent suit, and that there is nothing in S. 13, C. P. C., excluding this principle

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[1. This has to be reconsidered in the light of the decision of the Full Bench of the Madras High Court in *Somasundara* v. *Kulandaivelu* (1904) I.L.R. 28 M. 457 (465).—ED.]

[2. Cf. *Somasundara* v. *Kulandaivelu*, supra. In *Malhi Kunwar* v. *Imam-ud-din* (1904) I.L.R. 27 A. 59, it was observed by the Allahabad High Court (at p. 61 of the report) that "it would be an extraordinary thing to hold that where a party to a suit has no right of appeal the decision in that suit should operate as *res judicata*." See also Bigelow on Estoppel (5th Ed.) p. 114 :—ED.]

3. (1886) I.L.R. 11 B. 216.

of law. See *Magniram* v. *Medhi Hossein Khan.*[1] The question under what circumstances a former decision is *res judicata* in a subsequent suit as between co-defendants, though easy to state, has not been so easily answered by the courts. The leading English case upon the subject is that of *Cottingham* v. *Earl of Shrewsbury*[2] where WIGRAM V.C. observed: "If a plaintiff cannot get at his right without trying and deciding a case between co-defendants the court will try and decide that case and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains."

The principle laid down in that case has been followed in the Indian Courts. In order that questions decided in a suit between the plaintiff on the one hand and a group of defendants on the other may operate as *res judicata* it must appear that the determination of such questions was absolutely necessary for the determination of the plaintiff's own rights in that suit. *Anto* v. *Ardeshir*[3] and *Balwanta Rao* v. *Narayanshet*[4]. It is only stating the principle in another way if we say that there must be active controversy between the co-defendants. The leading Indian case on the subject is that of *Ramachandra* v. *Narayan*[5] and according to the judgment of MR. JUSTICE WEST in that case there must be " (1) a conflict of interests among the defendants and (2) the judgment must define the real rights and obligations of the defendants *inter se.*" See also *Ahmad Ali* v. *Najabhat Khan*[6] and *Balambhat* v. *Narayanbhat*[7].

It is not enough that certain questions are raised as between the defendants. The adjudication upon the question must be necessary as between the defendants in the former suit for giving the appropriate relief to the plaintiff therein.[8]

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1. (1903). I. L. R. 31 C. p. 95 at p. 100-101.
2. (1843) 3 Hare 627, s.c. 67 Eng. Rep. 530.
3. (1899) 1. Bom. L. R., p 303 (308).
4. (1902) 5 Bom. L.R. 97.
5. (1886) I. L. R. 11 B. p. 216.
6. (1895) I. L. R. 18 A., p 65,
7. (1900) I. L. R. 25 B., p 74.

8. *Magniram* v. *Mehdi Hossein Khan* (1903) I. L.R. 31. C, p. 95 at p 101; *Gurdeo Singh* v. *Chandrikah Singh* (1907) 5 C.L.J. 611; *Chajju* v. *Umrad Singh* (1900)I.L.R. 22 A 386; *Ibn Husan* v. *Brij Chukhan* (1904)I.L.R. 26 A. p, 407 (Per *Banerji* J at p. 442) *Macleod* v. *Vithal Singh*, (1904), I.L.R. 30 B. p. 250 at p. 260; 6 Bom. L. R. 995. *See also* *Balwantrao Balaji* v. *Narayanashet Mulshet* (1902) 5 Bom. L. R. p. 97, following *Ramachandra* v. *Narayan*, (1886) I.L.R. 11. Bom.,216 (220). and *Muhammad Kuni* v. *Visvanatha Aiyar*(1902)I.L.R. 26 M. 347.

Sometimes the test for deciding the question whether the adjudication was necessary or not for giving the appropriate relief to the plaintiff is to see whether the defendants are only *pro forma*, or, necessary parties.[1]

In the case of co-sharers, the same principle has to be applied, namely, whether the adjudication is necessary to give the appropriate relief to the plaintiff. *Prima facie* in a case of that sort no such adjudication is necessary as the plaintiff can ordinarily claim his own share, and it is now settled that Explanation 5 to S. 13, C.P.C., has no application.[2]

There is some conflict on the question as to whether an adjudication under the above circumstances will be binding if it is obtained *exparte* as against the defendant concerned.[3]

[But it is not, however, necessary to discuss this question here.—ED.]

YÂJÑAVALKYA-SMRITI
WITH
THE MITAKSHARA COMMENTARY.

[NOTE.—As the alterations made in the translation are pretty numerous, we ought, in justice to the original Translator,[4] to state that we are alone responsible for the translation as appearing in the present edition.—ED.]

[Original] TRANSLATOR'S NOTE.—It is intended to translate such portions of the Mitâksharâ' as have not been hitherto translated and have a bearing on law in the strict sense of the term. The

1. *Ahmed Ali* v. *Najabat Khan*, (1895) I.L.R. 18 A. p. 65 at p. 68; *Balambhat* v. *Narayanabhat*, (1900) I. L. R. 25 B. p. 74; *Mahabala Bhatta* v. *Kunhanna Bhatta*, (1898) I.L.R. 21 M p. 373 at p. 383; *Malhi Kunwar* v. *Imam-ud-din*, (1904) I.L.R. 27 A. p. 59; See, however, *Venkayya* v. *Narasamma*, (1887) I.L.R. 11 M. p. 204 (206).

2. *Nabin Chandra Mazumdar* v. *Mukta Sundari Debi*, (1871) 7. B. L. R. App. 38; *Surender Nath Pal Choundhry* v. *Brojo Nath Chowdry*, (1886) I. L. R. 13 C. 352; *Mahabala Bhatta* v. *Kunhama Bhatta*, (1898) I. L. R. 21 M. p. 373. at p. 383; *Somasundara* v. *Kalandavelu Pillai*, (1904) I. L. R. 28. M. p. 457.

3. *Chandu* v. *Kunhamud*. (1891) I. L. R. 14. M., p, 324 (327); *Sellathamall* v. *Oliver*, (1899) 9 M. L. J. p. 60. at p. 61; *Lalchunna* v. *Suravayya* (1894) I.L.R. 18 M. 164. But see *Mahammad Kuni Rowthan* v. *Visvanatha Iyar*, (1902) I.L.R. 26. M. p. 337. at p. 399 where, however, the point was not necessary for the decision. Compare *Nagasami* v. *Sundararajan* (1892) 2. M.L.J.R. 203 at p 206.

4. The Honorable Mr. P. S. Sivaswami Aiyar.

whole of the Vyavahára-kánda has been translated by Mr. Macnaughten and Mr. G. C. Tarkalankar, and the chapter on Inheritance which is included therein by Mr. Colebrooke. But the other parts of the Mitákshará have been neglected, either because they were supposed not to throw much light on law, or because the labour required was considered to be out of proportion to the passages bearing on law to be found scattered in them. But the other parts of the Mitákshará contain much that is useful to the lawyer. For example, the chapters on impurity and marriage will afford valuable help in the calculation of degrees of consanguinity, a matter of the utmost importance in the law of succession. The chapter on marriage has, however, an independent interest for the lawyer. It is needless to say, that there are several other chapters and passages relating to that portion of the Hindu Law which is administered by the courts. All these passages will be taken up *seriatim* from the commencement and carefully translated. Accuracy rather than literary elegance will be the aim of the transtator. To those who are not conversant with Sanskrit, the style of the commentary may appear somewhat curious, and a word in explanation of the usual method of our commentators may not be amiss. They analyze each sentence of the
[13*] * text, take each word of the sentence separately and explain it by synonyms, &c., beginning ordinarily with the subject and the predicate, and then introducing their qualifications, by way of answers to questions. After the whole sentence has been treated in this way, there follow discussions, quotations, &c., in support of the view taken by the commentator. It may be also mentioned that every slôka of the text is preceded by a short sentence or two by the commentator by way of introduction.

[The author of this work is the celebrated Vijuâneswara Yogi. Recent research has made it possible to fix his date with some little certainty. He was a resident of Kalyânapura the seat of the restored Châlukya dynasty and was the contemporary of King Vikramârka who reigned between 1076—1127 A. D. It is therefore inferred that he wrote in the latter half of the 11th Century A. D., and it is stated in Mr. Rice's standard work on Mysore and Coorg that the sage composed his celebrated Bhâshya in Malur in Closepet Taluk of the Mysore State (Vol. II 72). He was a Vaishnava by sect; and most of the residents of that place are even now Brahmins of the Sri Vaishnava sect. The statement of Mr. Morley that he is supposed to have resided in the North of India must be taken to be incorrect in the light of the above remarks. The work is a standard authority in all schools other than the Dayabhaga school. Even there it is treated as authority on points where the Dayabhaga is silent :—Ed.]

ACHARADHYAYA

OR

(Book or Division) on Observances (Religious and Moral).

INTRODUCTORY CHAPTER.

Obeisance to Ganesa ! Obeisance to Sarasvati ! Obeisance to elders (*Gurus.*)

I salute that Vishnu who is denoted by the word OM and who is ever untouched or unaffected by the virtues (*Dharma*), vices (*Adharma*), their three different results (*Vipâkâs*)* and the five troubles (*Klesa*)** which obtain among living beings or creatures.

The Dharma-Sâstra (Laws relating to Dharma) uttered (or delivered by the sage Yâjūavalkya and frequently treated with prolixity in obscure language by Visvarūpa [1] is expounded in plain and measured language for the comprehension of the young

A disciple of Yâjñavalkya gave out in a condensed form the Dharma-Sâstra declared by Yâjñavalkya in the form of questions [2] and answers[3] and as Bhrigu condensed the law uttered by Manu. This is the first sloka of Yâjñavalkya Smriti (so condensed).

1. The sages having revered Yajnavalkya, the Lord of Yogis (ascetics), said : ' Communicate to us fully the duties (dharmas) of the castes,[4] orders[5] and others. '

Of *Yôgis*, *i.e.*, Sanaka and others. Lord *i.e.*, best or chief. The sages Sâmasrava and others who were fit to hear and retain, having worshipped, by mental and bodily acts, him named, Yâjñavalkya* [*14] said : " Tell us the duties." How ? fully *i.e.*, entirely. Whose

[* This is the reading of Bâlambhatti. These fruits are stated to be Birth, Life and Enjoyment (Bâlambhatti).

** *i.e.* Ignorance, egotism, love, hate and attachment to life (Bâlambhatti.)]

(1). A previous commentator of the Yajnavalkya Smriti.

[(2). Questions (*i.e.*) by the sages (Bâlambhatti.)

(3). Answers (*i.e.*) by Yajnavalkya (Bâlambhatti).

(4). By *Varnas* are meant the four castes, *viz.*, Brahmins, Kshatriyas, Vaisyas and Sudras.

(5). By *Orders* are meant the four stages of life of a Dvija, *viz.*, those of Brahmachari, Grihasta, Vanaprastha and Sanyasi.

These rules or observances are thus limited to the above castes and orders and the mixed classes, *viz.*, the Anuloma and the Pratiloma.—ED .]

(duties) ? Of the castes, orders and others. *Varnâh* (*Castes*) *i.e.*, Brahmins and others. "*Âsramâh*" (*Orders*) *i.e.*, Brahmachâris (religious students) &c., *Others i.e.*, those produced by the proper or improper mixture of castes, as the Mūrdhāvasiktha (born to a Brahmin of a Kshatriya woman) and others. The word *Ithara* (इतर) is excluded from the category of pronouns by the rule of Panini "*Dvandvêcha*."

Here the word *Dharma* is applied to the six kinds of Dharma prescribed by the Smritis. These are as follows: The *Varna Dharma* or the observances of castes; the *Âsrama Dharma* or the observances of orders ; the *Varnâsrama Dharma* or the observances of castes and orders ; the *Guna Dharma* or those relating to particular attributes ; *Nimitta Dharma* or casual and consequential dharma, and *Sâdhârana Dharma* or *dharma* common to all. Of them *Varna Dharma* is exemplified by the rule beginning with : "A Brahmin shall always eschew liquor." *Âsrama Dharma* by the rules beginning with : "The kindling of the fire (sacred fire), living by begging one's food," &c.; *Varnâsrama Dharma* by the rules beginning with : "A *pâlâsa* stick is intended for Brâhmins,"[2] and the like ; *Guna-Dharma* by the rules beginning with : "The protection of subjects by a king possessing the attribute of having been duly anointed according to the Sâstras." *Nimitta Dharma* is expiation for omitting what is enjoined to be done and doing what is forbidden ; *Sâdhârana Dharma*, or dharma common to all, by the rules beginning with : "Forbear from cruelty." Forbearance from cruelty to all creatures is a *dharma* applicable to all down to the chandâla.

As it is prescribed to be the duty of a preceptor to inculcate the purification rules laid down in the Srutis, there is not much good in dwelling upon the utility of a study of the Dharma-Sastras. The order to be observed there is this :—Prior to Upanayana, men may do, speak and eat what they like.[3] After Upanayana and before beginning to learn the Vedas by rote, the study of the Dharma-Sastras ; then for a man who practises the self-control and observances dictated by the Dharma-Sastras, the study of the Vedas

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[1. See Gautama II, 20, Sacred Books of the East, Vol II, p. 188.

2. Âpastamba I, i, 2 § 38. Sacred Books of the East, Vol II, p. 9. See also Manu II § 45, Sacred Books Vol. XXV p. 38 and Yajnavalkya I. § 29 *infra.*

3. Gautama II § 3, Sacred Books of the East, Vol II, p. 185.—ED.]

by rote; then follows the desire to understand [1] the meaning of the Vedas and then the practice of the same.

Then with regard to Dharma-Sastra, though *dharma* (virtue), *artha* (wealth), *kāma* (desire) and *môksha* (absolution), the four ends of human life, are inculcated by this Sâstra, yet it is called Dharma-Sâstra on account of the pre-eminence of *dharma*. This pre-eminence is by reason of *dharma* being the source of the others (other ends). Nor should it be said that *dharma* is the source (cause) of wealth (*artha*), and that wealth is the cause of *dharma*, and that there is no difference between them. Because [15*]
even without wealth, *dharma* may be acquired by prayer, penance, pilgrimages, &c. But even a particle of wealth cannot be acquired without *dharma*. Similarly, with regard to desire (*kâma*) and absolution.

2. That prince of Yogis, resident at Mithila, having meditated for a moment, told the sages: "Understand the Dharmas in that country where the black antelope[2] is found."

Thus requested. That lord of Yôgis, Yâjñavalkya residing in the city named Mithila. Having meditated for a moment, *i.e.*, having concentrated his mind for some time reflecting: "these who are competent to hear, request with modesty and it is proper to communicate to them," spoke to the sages. What? "Understand the *Dharmas* in that country where the black antelope is found," *i.e*, in that country in which the black antelope roams freely, the *Dharmas* to be hereafter particularised are to be observed (or performed); and 'not elsewhere' is the intention.

It is the duty of the preceptor to teach the Dharma-Sastras as it is laid down that he should inculcate the purification rules.

It may be asked "Whence is it gathered that a pupil should study the Dharma-Sastras?" Hence the author says:

3. The Vedas coupled with the Puranas, Nyaya, Mimamsa Dharma-Sastras and the Angas are the 14 seats[3] (causes) of the sciences (or systems of knowledge) and Dharma.

[1. This includes the actual understanding.—Ed.]

[2. This is apparently indigenous to the country of Âryas and is used to exclude the country of the Non-Âryas:—Ed.]

[3. The 14 *sthânas* or seats are the four *Vedas*, the six *Angas* and the four others, expressly mentioned in the verse: thus making a total of 14:—Ed.]

"*Purânam*" as the Brâhmam and others. "*Nyâya*" is the science of logic. "*Mîmâmsa*" is the inquiry into the meanings of Vedic sentences. *Dharma-Sastras* are those of Manu and others. The *Angas* are six,[1] such as, Grammar, &c. With them combined, the four Vedas. "*Vidyah*" (sciences), are systems of knowledge subservient to human ends. Their seats are 14.[2]

The seats of *Dharma* are also 14. "Seats" (*Sthânam*) mean causes. And these ought to be learnt by members of the first three castes. The *Dharma-Sastra* being included in them should also be learnt. These should be learnt by Brahmins for the acquisition of knowledge and for the practice of *Dharma* and by the Kshatriyas and Vaisyas for the practice of *Dharma*. Accordingly, it has been observed by the sage Sankha after enumerating in their order the seats of *vidya*. "These the Brahmin is
[16*] entitled to learn and he shows others the * course of conduct to be followed." Manu also points out that only the twice-born classes are competent to learn the *Dharma-Sastra* and that only the Brahman is competent to teach and not others. "He about whom the performance of rites beginning with conception and ending with funeral is said to be with *mantras*[3]" is alone competent to learn the Sâstra and no one else. It should be cultivated assiduously by a learned Brâhmin and should be by him well taught to disciples and no one else is competent so to teach.

Admitting that the Dharma-Sastra should be studied, what is the importance of the Sastra declared by Yâjñavalkya? The author, therefore, says:

4 & 5: Manu, Atri, Vishnu, Harita, Yajnavalkya, Usanas Angiras, Yama, Apastamba, Samvarta, Katyayana, Brihaspati Parasara, Vyasa, Sankha, Likhita, Dakshas, Gauthama, Sathatapa and Vasishta are the institutors[4] of the Dharma-Sastras.

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1. The six *Angas* are 1. *Siksha* (pronunciation); 2. *Vyâkaranam* (grammar); 3. *Chandas* (metre); 4. *Jyotisham* (Astronomy); 5. *Nirukta* (Derivation or glossorial explanation of obscure terms especially occurring in the Vedas), and 6. *Kalpa* (texts of ritual or description of religious rites).

2. See p. 21, note (3).

3. Manu II § 16. Sacred Books Vol. XXV p. 32.

4. *Note.*—Mr. Mandlik translates the Sanskrit word *Prayôjaka* by the term propounders. To propound is to offer for consideration. But the literal meaning of the Sanskrit word is one who causes another to employ. The sages mentioned in the text did not themselves publish the laws to the world at large, but caused their disciples to declare them to the world. Besides, the works which bear the names of these sages always laid claim to be considered as authoritative

Up to the end of the word "*Usanas,*" it is a singular compound by the Dvandva-Samasa. The intention is that the Dharma-Sâstra declared by Yâjñavalkya should be read. This is not an exhaustive list but merely illustrative. Hence it is not inconsistent with this to hold as Dharma-Sâstras those declared by Baudhâyana, &c. Though each of these is binding by itself, in the case of such as are incomplete, the supply of the deficiency will be made from others. Wherever there is a conflict between them, the rule becomes optional.

Now, he mentions the efficient causes * (*kârakahetu*) *of Dharma.*

6. That wealth which is given with faith in the (proper) time and place, and in the (proper) mode, to a deserving person is the quality or mark of Dharma[1] as well as all others [laid down in the Sastras].

'*Place,*' *i.e.*, the country described [in verse 2] as that in which the black antelope dwells.[2] '*Time,*' *i.e.*, Sankrânti (the passage of the sun from one sign of the zodiac to another) &c. '*Mode*' *i.e.* the group of* modes laid down in the Sâstras. '*Wealth,* [17*] *i.e.*, kine, &c., obtained by gift or other means.[3] '*Faith*' *i.e.*, belief in God. Combined with faith. '*Person,*' of the description to be mentioned hereafter in the verses [4], *Na Vidyayâ,* &c. '*Is given,*' *i.e.*, abandoned so that the ownership of the other is completed and the thing does not return. This is the cause of Dharma. Is this all? He says "*no*" and says "*all others.*" Birth, quality, sacrifice[5], oblation to fire [6] and all else besides[7] that are stated in the Sâstras as the efficient causes of dharma. It is to be inferred that birth, quality wealth, and deeds[8] are the fourfold efficient causes of Dharma. And this either (taken) jointly (as a whole) or separately must be ascertained according to the shâstras. In every case, faith is a necessary element.

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declarations of the law and were never offered to the world like academical theses for acceptance and sanction. The word *Pravarthaka* is given as another reading but it conveys the same sense.

[* *Kârakahetu, i. e.,* the active or efficient causes, *i. e.,* the causes are connected with the acts themselves. The act is connected with the place, &c.]

1. Dharmalakshanam or Dharma Svarûpam or the active cause of Dharma.
2. See Note (2) p. 21.
3. See Yâjnavalkya I § 200 Et. seq. Mandlik p. 186.
4. See Yâjnavalkya 1 § 118. Mandlik p. 177.
5. This is to denote what is done standing.
6. This is to denote what is done seated.
7. 'Besides' this is to exclude time, place, &c.,
8. *Bhâvârtha* explained here as *deeds* is explained by Bâlambhatti as faith.

*Now the author goes on to lay down the indicative causes** (ज्ञापकहेतु) *of Dharma.*

7. The Sruti, the Smriti, the practice of good men, what is agreeable to one's self, and desire arising from well regulated conceptions, these are mentioned in the Smrities as the standard or authorities (sources) of Dharma.

"*Sruti,*" *i.e.*, Veda; "*Smriti,*" *i.e.*, Dharma-Sâstra. So Manu has said [1]: 'Sruti is to be understood as Veda, and Smriti as Dharma-Sastra.' "*The practice of the good,*" means the practice of men of well-regulated lives and not of men of ill-regulated lives. "*That which is agreeable to one's self*" applies in optional matters, as where a thing is prescribed in the 8th year after conception or birth,[2] one's pleasure alone is the standard. "*Desire*" arising from a proper conception and not inconsistent with the Sāstra as, a fancy that water will not be drunk by me except during meals. These are the sources, *i.e.*, authorities of *Dharma*. In a conflict between these, each prior one is of superior authority to the succeeding one.

He cites an exception to the efficient causes of Dharma such as place, etc.

8. Of the various acts, viz., sacrifice, religious observance self-control, forbearance from cruelty, gift, and a thorough study of the Vedas, this is the highest Dharma, viz., the seeing of one's self by yoga.

Of the acts, such as sacrifice, &c., this is the highest *Dharma*, *viz.*, the seeing of one's self, or the knowledge of the truth about self by restraining the objective tendency of the mind (by introspection).

[9*] * The meaning is that, as regards (the acquisition of) a knowledge of self by means of Yôga, the restriction as to the place, &c., does not exist. As it is said that where there is

[*A ज्ञापकहेतु is literally a cause which makes known or instructs. That which produces knowledge of dharma. Liberally translated it means 'authorities.' The *vidhi* (rule) that a person performing the *jyôtishtoma* sacrifice attains *svarga* (heaven) is only an instance of a *jnâpakahetu*:—ED.]

(1) *See* Manu II § 10. Sacred Books: Vol. XXV. p. 31. (2) *See* Yâjnavalkya I § 14 *infra*.

intense concentration of mind, there is no perception of difference.[1]

The author now speaks about the means (causes) of determination where there is a doubt either with regard to the efficient causes (karakahetu) or the indicative cause (Jnapakahetu).

9. What an assembly of four persons learned in the Vedas and Dharma, or learned in three sciences or a single individual most conversant with a knowledge of the Supreme Spirit declares as Dharma shall be so.

"*An assembly,*" means four Brahmins who know the Vedas, Sâstras and Dharma. *Thraividyâh* means those who study three sciences.[2] A collection of them is called *Thraividyam.* The knowledge of Dharma-Sâstra follows here too. Or (it is) an assembly, of that description ; (viz., an assembly of those who study the three sciences). That which an assembly (*parshat*)[4] of the kind mentioned above lays down is *Dharma.* Or whatever a single individual excelling in knowledge of the Supreme Spirit and versed in the Vedas and Dharma-Sastra lays down, is *Dharma.*

END OF THE INTRODUCTORY CHAPTER.

CHAPTER II.

CHAPTER RELATING TO RELIGIOUS STUDENTS.

Having by these nine slokas premised an introduction to the whole Sâstra, he now intends to describe the duties of castes, &c., and in the first instance mentions the castes.

10. Brahmins, Kshatriyas, Vaisyas and Sudras form the castes. The first three are Dvijas (twice born). For them it is that all rites beginning with conception and ending with the

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1. Brahma Sutra IV, I. Bâlambhatti refers to it as the sutra of Patanjali. This is his explanation of the passage: "As it is said that whoever has concentration of thought, the limitations (as to place &c.,) has no application to him."

2. These are the three Vedas, viz., Rik, Yajur and Sama (Aparârka).

3. According to Apararka a *Thraividyam Parshad* is an assembly of three Brahmins who know the Rig, Yajur and Sâma Vedas.

4. It is an assembly of Brahmins which may consist of four Brahmins who know the four Vedas, the Sastras and Dharma, or it may consist of three Brahmins who know the three Vedas and Dharmas. (Apararka). Apararka cites for his explanation the texts of Manu on the subject. See Manu, Chapter XII §. 112. Manu deals with *parshad* in Ch. XII § 108-114, Sacred Book of the East, Vol. XXV, pp. 509, 510. *See* also the remarks of Buhler upon this subject—Sacred Book: Introduction, Vol. XXV, p. lii.

obsequies (or rites performed in the burning grodnd) are (ordained to be done) with mantras.

The Brahmins, Kshatriyas, Vaisyas and Sudras are the four castes whose characteristics will hereafter be noticed.[1] Of them the first three, the Brahmins, Kshatriyas and Vaisyas are *Dvijas.*

Dvijas, because they are born twice. These (rites) are for the Dvijas alone, and not for the Sudras. "Beginning with conception," *i.e.*, those rites of which *Garbhadhana* is the first
[*19] and* the rites performed in the burning-ground (are the last) are performed with mantras.

Now he enumerates in order those rites.

11. Garbhadhanam in season, Pamsavanam before quickening, Simantam in the sixth or the eighth month; Jathakarma on the day of birth.

12. Nama-karana on the eleventh day after birth; Nishkrama in the fourth month after birth; Annaprasana in the sixth month, and tonsure according to the practice of the family should be performed.

Garbhâdhânam is the name of a rite with an obvious meaning.[2] So are those mentioned later. The *Garbhâdhânam* should take place in the period to be described hereafter[3]. The right called *Pumsavana* (lit, causing the birth of a male child) before quickening. In the sixth or eighth month, the ceremony of *parting of the hair.* These two, *Pumsavana* and *Sîmanta,* being rites for purifying the wife, are to be performed only once and not at each pregnancy. As Dêvala says: "Once a woman has been well purified, she is well purified in all pregnancies." The word *Ete* (एते) is composed of *A* (ए) and *ite* (इते) and means '*come.*' *Jâtakarma* is when the boy has been delivered from the womb. On the eleventh day the *name-giving* (ceremony) is done; and that (*i. e.* the name) should be connected with the paternal or maternal grandfather, etc., (of the child) or with the family deity. As Sankha says: "The father shall confer a name connected with the family deity." In the fourth month, the rite called *Nishkrâma* or the rite of beholding the sun. In the sixth month the rite of *feeding with rice.* Tonsure, however, is according to the family (usage). The

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1. *See* Chapter IV. 2. 'With a literal meaning' or 'meaning taken literally.'
3. See Yâjnavalkya I, § 79.

word *Kârya* (should be performed) is connected with each (of the above.)

Though these are obligatory, still he mentions the benefit necessarily arising therefrom.

13. Thus the sin or impurity arising from seed and womb is destroyed. These rites are to be done silently in the case of females (female children). But marriage, however, is to be celebrated with mantras.

Thus, by doing the purificatory rites *Garbhâdhâna*, &c., in the manner prescribed herein, the sin is destroyed. How arising ? Arising from seed and womb, *i. e.*, relating to semen and ovum and arising on account of the transmission of bodily diseases, but not (arising) by birth from degraded parents and the like. He mentions a special rule in the case of females. These rites *Jâtha-karma* and the rest are to be done silently, *i. e.*, without mantras according to the proper time. But marriage is with mantras.

(*Time for Upanâyana.*)* [*20]

14. Upanayanam for a Brahmin in the eighth year from conception or from birth. For Princes in the eleventh and for Vaisyas in the twelfth. Some say, according to the family (usage).

Upanâyanam of a Brahmin in the eighth year computed from conception or from birth as the starting point. The word Upanayana becomes Upanâyana by the pleonastic addition of *añ* to suit the exigency of the metre.[1] Here an option is allowed according to one's desire.

For princes, in the eleventh year. For Vaisyas in the 1 + 11th year, *i. e.*, 12th year. The word *garbha* (conception) should be taken as following everywhere. Though the word *garbha* is merged in a compound, the word should be mentally separated and should be made to extend to both cases on account of the passage in another Smriti[2] "for princes (kshatriyas) in the eleventh year from conception, and for Vaisyas in the twelfth year from birth" as in construing the sutra of Mahâ-Bhâshya "then the rules (or precepts) as to words. What words (Sabdâs) ? (*i. e.* those) of ordinary and Vedic words." Here too the word *karyam* (should be done) should be understood.

1. Balambhatti says that this reading स्वार्थे अण् वृत्तानुसारात् is wrong. He will have only the expression स्वार्थे अण् (by the pleonastic addition of *an*).

2. Manu II, § 36. Sacred Books Vol. XXV p. 36.

Some desire the Upanayanam to take place according to the practice in the family.

(*Preceptor's Duties.*)

15. The guru, having invested the pupil with the holy thread and after duly pronouncing the great Vyahrithis, should teach him the Veda and the purificatory rites.

The guru having invested the pupil with the sacred thread according to the rules laid down in his (guru's) *grihya* treatises (*i.e.*, those relating to household duties) and after duly pronouncing the great *Vyâhrithis* should teach him the Veda. The great *Vyahrithis* are the seven beginning with भूः (*Bhuh*) and ending with सत्य (satya), or (they are) five according to the opinion of Gautama.[1] And he shall teach the purificatory practices to be described herein. By mentioning that the guru shall teach the rules of purification after Upanayanam, it is indicated that a person is at liberty to do what he likes before Upanayanam. If the Varna Dharmas are excluded, the same thing, *viz.*, (liberty to do what they like) holds good of women before marriage; marriage, in their case, taking the place of Upanayanam.

[*24] CRITICAL NOTES.*

R. *v.* Tolson.—23 Q.B.D. 168.—An interesting case illustrating the somewhat ill-understood principle of *actus non facit reum nisi mens sit rea* was decided by the Queen's Bench Division in 1889. The point in question, however, cannot be considered as settled as the judges did not agree in their judgments; five judges dissenting from the view of the majority consisting of nine judges. One M. A. Tolson was married to her husband on the 11th September 1880. He deserted her on the 13th December 1881. On 10th January 1887 M. A. Tolson believing, in good faith, and on information from her husband's relatives, that he was dead, went through the ceremony of marriage with another man, whom she duly acquainted with all the circumstances of the case. M. A. Tolson was indicted for bigamy under 24 & 25 Vic. Ch. 100 S. 57. *Stephen* J. directed the jury, that a belief in good faith and on reasonable grounds that the husband was dead was no defence to the charge, but stated

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1. Gautama I, § 51; Sacred Books of the East, Vol. II, p. 183.

that he did so, in order to obtain the decision of the Court in view of the conflicting decisions on the point. The jury found the prisoner guilty, but stated, in answer to a question by the judge, that the prisoner *bona fide* believed her husband to be dead. The judge sentenced her to one day's imprisonment and referred to the full Court the question whether the direction was right. The section of the statute under which the indictment was framed was as follows : " Whoever, being married, shall marry another person, during the lifetime of the former husband or wife, shall be guilty of felony, punishable with penal servitude for not more than seven years or imprisonment with or without hard labour for not more than two years " with a proviso that " nothing in this Act shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years last past, and shall not have been known by such person to be living within that time."

There can be no doubt that the prisoner fell under the very words of the statute ; her case was rested on the principle that " a crime is not committed if the person doing the act in question be innocent." " That there must be a mind at fault before there be a crime." It is impossible to state, in this short note, either the arguments addressed for the prisoner, or the grounds on which the judgments of the Court were based. We shall state only the conclusion. The majority of the judges, consisting of *Lord Coleridge* C. J., *Hawkins*, *Stephen*, *Cave*, *Day*, *A. L. Smith*, *Wells*, *Grantham* and *Charles*, JJ., held that the conviction must be quashed and that a *bona fide* belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defence to the indictment and that the proviso to the section does not " point out the sole excuse of which the act allows" but merely " specifies one particular case and indicates what in that case shall be sufficient to exempt the party, without any further enquiry, from criminal liability." The dissenting judges *Denman*, *Field*, *Manisty*, JJ. and *Pollock* and *Huddleston* B. B., held that the section is in clear and express terms, and that the proviso states the only valid excuse in cases coming within the strict terms of the statute.

Derry v. Peak.—14 A. C. 337.—This is a very important decision of the House of Lords on the question what constitutes

fraud, on which an action for damages may be based.[1] The facts of the case are very briefly as follows. By a special Act of Parliament, the Plymouth Devonshire and District Tramways Company
[*25] was authorized to make certain tramways. *The Act stated that the carriages used might be moved by animal, and, with the consent ot the Board of Trade, by steam or any mechanical power, for fixed periods and subject to the Regulations of the Board. The defendants (appellants before the House of Lords) in a prospectus which they issued, stated *inter alia* that the Company had the right to use steam or mechanical motive power instead of horses. The plaintiff (respondent before the House) relying on the representation and believing that the Company had absolute power to use steam and other mechanical power, applied for and obtained shares in the Company. The Board of Trade refused consent to the use of steam or mechanical power except on certain portions of the tramways. The Company was wound up. The plaintiff brought an action of deceit against the defendants (appellants) claiming damages for the defendant's fraudulent misrepresentation whereby the plaintiff was induced to take shares.

Stirling, J. at the trial found that the defendants honestly believed the statement to be true, and their grounds for doing so were not so unreasonable as to make their action amount to fraud. The Court of Appeal reversed that decision and held that the defendants had no reasonable grounds to believe it to be true, and they were guilty of fraud. The House of Lords unanimously reversed the decision of the Court of Appeal and restored that of *Stirling*, J. They held that the defendants honestly believed the statement to be true, and although the statement was untrue in fact and the defendants acted with greatcar elessness, no action for deceit would lie. They held that a false statement made through carelessness, and without reasonable ground for believing it to be true, may be evidence of fraud, but does not by itself constitute fraud. In an action of deceit the plaintiff must prove actual or moral fraud though this is not necessary to

[1. See as to the effect of *Derry* v. *Peak* upon the law as administered before 53 & 54 Vic. C. 64, *Le Lievre* v. *Gould* (1893) I. Q. B. 491; *Low* v. *Bouverie* (1891) 3 Ch. 82 (100); *Angus* v. *Clifford* (1891) 2 Ch. 449 (463,464); *Tomkinson* v. *Balky Consolidated Company* (1891) 2 Q. B. 614 (621); see also *Starkey* v. *Bank of England* (1903) A. C. 114 (116):—Ed.]

avoid a contract on the ground of fraud or misrepresentation. Fraud is proved when it is shown that a false representation has been made "knowingly or without belief in its truth or recklessly without caring whether it be true or false." But, however unreasonable the belief in its truth may be, if the person making the statement is not guilty of dishonesty, an action for deceit will not lie. "A man who makes a statement without care and regard for its truth or falsity commits a fraud." "But this is very different from making a statement without taking care to ascertain its truth." The above decision has led to considerable discussion in England in the columns of the *Law Quarterly Review*.[1] SIR FREDERICK POLLOCK maintains that it is incorrect and not in accordance with the previous decisions on the point, and is not calculated to the maintenance of a high standard of commercial integrity.[2] SIR W. ANSON upholds the contrary view and strongly argues that the decision of the House of Lords is right[3].

In this country, the requisites of *bona fides* have not been determined judicially with regard to the question of fraud,[4] but the question has arisen what constitutes want of *bona fides* in certain other cases. The Madras High Court held in *Hall* v. *Vencatakrishna*[5] that the absence of reasonable and probable cause is only evidence of malice in law and does not in itself constitute malice, in actions for malicious prosecution; and in *Sesha Aiyangar* v. *Ragunatha Row*,[6] which was an action against a public servant for damages for having without jurisdiction pulled down the plaintiff's house under the provisions of the Code of Criminal Procedure for the removal of nuisances that are obstructions to public thoroughfares, it was held that want of reasonable and probable cause did not in itself constitute want of *bona fides* and was only evidence of it. *The question in that case was whether the defendant had jurisdiction to do the act complained of or acted in the *bona fide* belief that he had jurisdiction. The first question was determined in the negative. With regard to the second question, the Court (*Scotland*, C. J. and *Holloway*, J.) found as a fact that the defendant [*26]

1. *See* 5 L. Q. R. 410 and 6 L. Q. R. 72. 2. 5 L. Q. R. 410 to 423.

3. 6 L. Q. R. 72 to 74.

[4. The rule laid down in *Derry* v. *Peak* was followed by the Allahabad High Court in *Abdulla* v. *Abdur Rahman* (1896) I. L. R. 18 A. 322. (324). See also *Shanto* v. *Nain Sukh* (1901) I. L. R. 23 A. 355 (358) :—ED.]

5. (1890) I. L. R. 13 M. 394. 6. (1870) 5 M. H. C. 345.

had no reasonable grounds to believe that he had jurisdiction, but held that the absence of reasonable grounds did not amount to want of *bona fides*. *Holloway*, J. observed: "The question is not whether he really did this act for the benefit of Her Majesty's subjects or to please the trustees of the pagoda against whom the statute of limitations had run, or even whether with a knowledge of the facts and a reasonably competent knowledge of the law, he ought to have believed that he had jurisdiction but whether *without such reasonable* grounds he did in fact believe it." The conclusion arrived at by the eminent Judge was that "there was much violence, much rashness and no small infusion of vanity itself calculated to an erroneous but perfectly honest belief that he had jurisdiction."

S. 52 of the Penal Code enacts that nothing is said to be done or believed in good faith which is done or believed without due care and attention. This definition is made applicable by S. 1 of the Madras General Clauses Act I of 1867[1] to all future Acts of the Madras Council. This of course did not apply to the case of *Seshayangar* v. *Ragunatha Row*[2] which was governed by Act XVIII of 1850 of the Supreme Council. It is worth while to note that in consequence of the decision of the House of Lords in *Derry* v. *Peak*,[3] an Act has been passed in England styled the Directors' Liability Act (53 & 54 Vic., c. 64) which make Directors of Companies liable for statements made in prospectuses without due caution.

Beck *v.* Pierce.—23 Q. B. D. 316.—The decision in this case will be of considerable importance when the courts here are again called upon to consider the period of limitation for a suit brought by a creditor to enforce against the sons of a Hindu father a decree obtained against the father. The facts of the case may be summed up in a few words. The plaintiff *Beck* sued the defendant for payment of a bill of costs incurred by the defendant's wife before her marriage. Part of the work to which the bill of costs related was done more than six years before the commencement of the action, and the remainder since then; all of it, however, was done within six years before the defendant's marriage. The plaintiff had obtained judgment against

[1. *See* now the Madras General Clauses Act I of 1891 S. 3 (11) and the General Clauses Act X 1897 S. 3 (20):—Ed.]

2. (1870) 5 M. H. C. 345.

3. (1889) 14 A. C. 337.

the defendant's wife in an action to which the defendant was not a party. But it remained unsatisfied as she had no separate estate. The defendant admittedly had acquired from his wife property exceeding the amount of the debt. According to the Married Women's Property Act (45 & 46 Vict. C. 75) the husband is liable for the wife's debts incurred prior to the marriage to the extent of the property obtained from her. His liability accrues, of course, only at the date of the marriage. The defendant relied chiefly on two pleas, *first*, the judgment recovered against the wife was said to be a defence to the whole action on the authority of *King* v. *Hoare*;[1] *secondly*, limitation was relied on with reference to so much of the plaintiff's debt as became due more than six years before the suit. On the first point, the Court of Appeal held that the liability of the husband and wife was not merely a joint liability arising out of a joint contract or tort, and that *King* v. *Hoare*[1] did not apply. The plea of limitation, however, was allowed. The court disagreed with the contention of the plaintiff's counsel that the cause of *action [*27] against the husband arose only on the date of marriage. It was held that "although the defendant's marriage is what makes him liable" the cause of action in respect of which he is liable "is still the wife's contract, not his own." They held also that the fact that a judgment had been obtained against the wife, did not affect the husband and did not furnish a cause of action against him.

The case of a suit against a Hindu son to enforce a debt for which a decree has been obtained against the father is, it will be evident, in several respects similar to this case. Both the points decided by the Court of Appeal were raised in the Madras High Court. In *Rama Krishna* v. *Namasivaya*[2] a Full Bench of the Madras High Court held that the doctrine in *King* v. *Hoare*[3]

1. (1844) 13 M. & W. 496. [*See* also Leake on contracts pp. 884, 885. But see as to alternative liability, *Moral Brothers* v. *Westmoreland* (1904) A. C. 11. and *French* v. *Howe* (1905) 2 K. B. 580:—Ed.]

2. (1884) I. L. R. 7 M. 295.

3. (1844) 13 M. & W. 496. [Upon the question whether the doctrine has application to this country, see *Muhammad Askari* v. *Radhe Ram* (1900) I. L. R. 22 A. 307; *Dick* v. *Dhunji Jaitha* (1901) I.L. R. 25 B. 378; *Hemendro* v. *Rajendro* (1878) I. L. R. 3 C. 353; *Bhukbandas* v. *Lallubai* (1892) I. L. R. 17 B. 562; *Barber* v. *Ramana Goundan* (1897) I. L. R. 20 M. 461; *Gurusami* v. *Chinna Mannar* (1881) I. L. R. 5 M. 37 (44, 46); *Umamaheswara* v. *Singaperumal* (1885) I. L. R. 7 M. 376 (378).—Ed.]

would not apply to a suit by a creditor against the sons for a declaration that their shares in the family properties which had been released from attachment on their objection, were liable to be sold in execution of the decree against the father. Similar suits were allowed also in *Arunachela* v. *The Zamindar of Sivagiri*;[1] *Arunachela* v. *Munisawmi*[2] and other cases, though the point was not raised in those cases. The question of limitation arose in *Arunachela* v. *The Zamindar of Sivagiri*.[1] The court, consisting of *Muthusami Aiyar* and *Hutchins* JJ. held that the cause of action against the son arose only on the father's death, and that the suit, which was brought within six years after his death, was not barred. This is not quite in accordance with the view taken by the Court of Appeal. Suppose the execution of the decree had been barred during the lifetime of the father. It would, of course, be impossible to hold in that case that on the father's death the creditor could again sue the son. The principle enunciated by the Court of Appeal in *Beck* v. *Pierce* would seem to hold good equally well here, and it might with great force be said that although the son might not be liable to pay the debt before the father's death, the cause of action still is the father's contract, not his own. Their Lordships, however, did not rest the decision on that ground alone. They observed that the suit was really based on the decree and the original obligation had passed into a judgment debt.[3] A similar argument was not allowed to prevail by the Court of Appeal, and it was held that a judgment against the wife would not bind the husband or create a cause of action against him. In this country, however, it may be argued that the father *has* power to represent the sons in suits, and if it be held that he could do so in suits for debts contracted by himself, it will necessarily complicate the question. But in that case the creditor's remedy against the sons would seem to be by executing the decree and not by fresh suit, and it is difficult to see how the creditor can be allowed to have more time for

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1. (1883) I. L. R. 7 M. 328.

2. (1883) I. L. R. 7 M. 39.

3. [As to whether a suit will lie upon a judgment see *Mallesam Naidu* v. *Jugala Panda* (1899) I. L. R. 23 M. 292 (see order of reference at 293). The decision in *Periasami* v. *Seetharama* (1903) I. L. R. 27 M. 243, while recognizing that no such suit might lie, held that the decree created a liability and that a suit might lie to enforce such liability.—ED.]

proceeding against the sons than against the father.[1] If an attachment of family properties is set aside at the instance of the sons, it will probably be open to the creditor under Article 12, Sch. II, of the Limitation Act to sue to make them liable within one year from the date of the order releasing the properties—see *Sitanath Koer* v. *Land Mortgage Bank of India.*[2] But when he does not do so, it is open to doubt whether he can be allowed to rely on the judgment against the father as a fresh cause of action against the sons, except perhaps, where the judgment alters the original right and creates new rights as may be the case when it is based on a compromise between the parties. Such was actually the case in *Arunachela* v. *The Zamindar of Sivagiri.*[3] The original debt was made payable by instalments by a compromise which further charged the debt *on certain immoveable properties; and the judgment was rested partially on the ground that the suit was filed within 12 years from the time that the instalments became due and therefore within time under Article 132, Sch. II, of the Limitation Act. In this view, the judgment does not really conflict with the view taken by the Court of Appeal in *Beck* v. *Pierce.* [*28]

NOTES OF INDIAN CASES.* [*56]

Hari Doyal Singh Sarmana *v.* **Grishchunder Mukerjee.**— I. L.R., 17 C. 911—This is a well considered decision by *Macpherson* and *Banerjee*, JJ. on an important branch of Hindu law—that of stridhan. The Court held that where the stridhan of a mother had been inherited by the daughter, it passed on the latter's death not to her heir but to the next heir to the mother's stridhan. *A* inherited the stridhan of *B*, her mother: on the death of *A* the property was held to pass to the sons of *B* who were nearer heirs to the stridhan of *B* than the children of *A*. The decision was under the Bengal law. But several of the authorities cited are binding in the other provinces as well.[4]

1. [Limitation for the cause of action arising from the decree if subsisting on the date of the father's death would be from the date of decree. The Article applicable is Art. 120 and not Art. 122. *Periasami* v. *Seetharama* (1903) I. L. R. 27 M 243 :—Ed].

2. (1883) I. L. R. 9 C. 888.

3. 1883 I. L. R. 7 M. 328.

4. [*Sheo Partab Bahadur Singh* v. *The Allahabad Bank* (1903) I.L.R. 25 A. 476, 30 I.A. 209; *Sheo Shankar Lal* v. *Debi Sahai* (1903) I.L.R. 25 A. 468; 30 I.A. 202 Explained in *Subramanian Chetti* v. *Arunachelam Chetti* (1904) I. L. R. 28 M. 1.—Ed.]

Cohen v. Sutherland.—I. L. R. 17 C. 919.—A contract for the sale of a house was contained in letters. Entry was to be given to the purchaser by a fixed date, but the title deeds were to be sent to his solicitors and " on approval of the same the purchase-money to be paid prompt." In a suit for specific performance the Court (*Petheram* C. J., *Prinsep*, *Pigot* and *Wilson* JJ.) held that the completion of the sale was not conditional on the approval of the solicitors, but that the title was to be investigated in the ordinary way The approval of the purchaser's solicitors was only a condition precedent to the prompt payment of the purchase-money, but not to the conveyance.

Queen-Empress v. Solomon.—I. L. R. 17 C. 930.—The Crown has no right of reply merely because documents have been put in by the defence in the course of the cross-examination of the prosecution witnesses. S. 292, Cr. P. Code, gives the right only when the accused has stated in reply to questions under S. 289 that he means to adduce evidence. [See also *Empress* v. *Kaliprosonno Doss*,[1] *Empress* v. *Krishnajee*;[2] per contra *Queen-Empress* v. *Venkatapathi*[3], *Empress* v. *Hayfield*[4] and *Empress* v. *Moss.*[5] The question now turns upon the meaning of the expression " adduces any evidence " in S. 292 of the present Code and has been discussed in an article in 10 M L. J. 316. *See* also *Emperor* v. *Stewart.*[6]—Ed.]

MacMillan v. Sureschunder Deb.—I. L. R. 17 C. 951.—This was an important decision on the law of copyright by *Wilson*, J. sitting on the original side. MacMillan & Co. had the copyright of the " Golden Treasury," a book of selections prepared by Francis Palgrave. The selections were arranged in a particular order with short notes. The Court held that such a " selection " could be the subject-matter of a copyright and that a book containing the same selections in a different order, although with certain variations in reading, constituted a piracy of MacMillan & Co.'s copyright. *Held* further that successive issues of a book under the same name may be presumed to be substantially the same book, that MacMillan & Co. were entitled to the copyright without shewing assignment of it by Palgrave, that the title to copyright is com-

1. (1886) I. L. R., 14 C. 245.
2. (1890) I. L. R. 14 B. 436.
3. (1888) I. L. R., 11 M. 339.
4. (1892) I. L. R. 14 A. 212.
5. (1893) I. L. R. 16 A. 88.
6. (1904) 8 C.W.N. 528 ; 31 C. 1050.

plete before registration which is only a condition precedent to the right to sue, and that the period of limitation is not 12 months from the publication of the pirate edition as provided in S. 26 of 5 & 6 Vic., c. 45.

Tarinichurn Sinha v. Watson & Co.—I. L. R. 17 C. 963.—The right of fishing in a public navigable river is not extinguished by the river changing its course.[1] (*O' Kinealy* and *Ameer Ali*, J. J.)

***Mon Mohan Sircar v. The Secretary of State for India in Council.**—I. L. R. 17 C. 968.—This is a decision of considerable importance. *O'Kinealy* and *Ameer Ali*, JJ. held that where a decree for possession of land was silent about the mesne profits subsequent to the date of suit, a fresh suit for such profits would not be barred either under S. 13 or S. 244, C.P.C. But see judgment in A. S. No. 139 of 1889, Madras High Court. *Ameer Ali*, J. also observes that a person suing for land need not necessarily include a claim for mesne profits in the suit. S. 43, C. P. C., and the illustrations thereto would appear to militate against the view. [*See Bhivrav* v. *Sitaram*,[2] *Ram Dayal* v. *Madan Mohan*,[3] *Kuppusami* v. *Venkataramier*[4] and *Hays* v. *Padmanand*.[5] —ED.] [*57]

Rustomji Framji v. Banoobai.—I. L. R. 14 B. 584.—This was a decision by *Farran* J. as a single Judge on the original side. An application was made under S. 640, C. P. C., for a commission for the examination of a female witness on the ground that she was in mourning for the death of her husband 10 months before. *Held*, that this would not justifiy the issue of a commission as a custom of a varying and uncertain character was not what was referred to in S. 640.

Munshi Shaikh Abdur Rahiman v. Mirza Mahomed Shirazi. I. L. R. 14 B. 586.—The translator of a book into another language does not infringe the copyright in the book under Act XX of 1847. There is no mention of translation either in this Act or in the Statute 5 & 6 Vic. C. 45.

Malukchandbin Gyanmal v. Shanmoghan Vardraj.—I. L. R. 14 B. 590.—A power of attorney must be construed strictly.[6] An

1. [*See* also *Harichandra Chowdhury* v. *Jagadindra Nath Roy*(1905) I.L.R. 33 C. 15; *Jogendra Narayan Roy* v. *Crawford* (1905) I.L.R. 32 C. 1141.—ED.]

2. (1906) I. L. R. 34 C. 20.
3. (1899) I. L. R. 21 A 425.
4. (1903) 14 M. L. J. 462 (F.B.)
5. (1903) I. L. R. 32 C 118.
6. [See *Sansone Ezekiel* v. *Addi Raja* (1864) 2 M. H. C. 177 :—ED.]

authority to "dispose" of certain property does not extend to a mortgage of such property. [An authority to manage will not import an authority to sell. *Yesa* v. *Fulchand.*[1]—Ed.]

Mulna Amad v. Ganesh Gadbole.—I. L. R. 14 B. 594.—An appeal admitted *ex parte* beyond time under S. 5 of the Limitation Act by the District Judge may be rejected by the Sub-Judge to whom it is referred for disposal, on the ground of limitation.

Hari Vithal v. Jairam Vithal.—I. L. R. 14 B. 597.—A sale of family property in execution of a decree for arrears of rent due by the family against the managing member of the family, held to pass the shares of the other members, the plaintiffs in a subsequent suit for partition, of their shares. The decision follows the Privy Council case of *Daulat Ram* v. *Mehr Chand*,[2] overruling *Lahshman Venkatesh* v. *Kashinath* [3] and *Maruti Narayan Lilachand.*[4] [The decision is followed in *Sheo Pershad Singh* v. *Saheb Lal*,[5] and *Davalava* v. *Bhimappa*[6].—Ed].

Moula Khan v. Gorikhan.—I. L. R., 14 B. 627.—The investigation of claims under S. 331, C. P. C., is not limited to the question of possession. Any question of title between the parties connected with the right of possession may be determined finally in such investigation. See also *Rakhal Churn* v. *Watson*,[7] *Bapuje Rao* v. *Fatesing*,[8] [where a plea of *justertii* was allowed to be set up—Ed.] *Mancharam* v. *Fakirchand*[9] and *Mahomed Isub* v. *Bashotappa.*[10] Where the claim related to property less than Rs. 5,000 in value, the appeal from the decision of the First Class Sub-Judge lay to the District Court and not to the High Court. See *Kalima v. Nainan.*[11]

Kishore Singh v. Sabdal Singh.—I.L.R. 12 A 553.—A plaint may be rejected under S. 54 of the C. P. C. at any stage of the suit. The Calcutta and Madras High Courts do not seem to agree in this view. *Valiya Kesava Vadhyar* v. *Suppan Nayar*[12] and *Hubibul Hossein* v. *Mahomed Raza.*[13] [See the cases discussed in *Padmanum* v. *Anant Lal.*[14]—Ed.]

1. (1902) 4 Bom. L. R. 964.
2. (1887) 14 I. A. 187.
3. (1886) I. L. R. 11 B. 700.
4. (1882) I. L. R. 6 B. 564.
5. (1892) I. L. R. 20 C. 453.
6. (1895) I. L. R. 20 B. 338.
7. (1883) I. L. R. 10 C. 50.
8. (1897) I. L. R. 22 B 967.
9. (1901) I. L. R. 25 B 478.
10. (1903) I. L. R. 27 B 392.
11. (1890) I. L. R. 13 M. 520.
12. (1880) I. L. R. 2 M. 308.
13. (1881) I. L. R. 8 C. 192.
14. (1906) I. L. R. 34 C. 20.

***Wahid Alam v. Safat Alam.**— I. L. R. 12 A. 556.—Where the [*58] plaintiff claimed exclusive possession of immoveable property, *held* that the Court was competent to give him a decree for joint possession on the finding that the property belonged to both parties jointly. [See also *Parashram* v. *Miraji.*[1]]

Takuddus Fatima v. Baldeo Das.—I. L. R. 12 A. 564.—The authority given by S. 320, C. P. C., to the Local Government (prior to the amendment by S. 30 of Act VII of 1888) to make rules for the procedure of the Collector in executing a decree transferred to him included the power to make a rule providing for an appeal from the Collector's order. The point deserves consideration.

Mitthu Lal v. Khairati Lal.—I. L. R. 12 A. 569.—A decree was payable by instalments, the whole amount payable at once on default of one instalment. Application for execution was made more than 3 years after the first instalment became due. The judgment-debtor pleaded limitation as nothing had been paid. The decree-holder pleaded waiver of the default by acceptance shortly after the due date of payment of the first instalment out of Court. *Held*, that the application was barred and that the waiver could not be pleaded as the payment had not been certified to the Court and could not be recognized in consequence. *Shamlal* v. *Kanahia Lal*[2] and *Zahur Hussain* v. *Bhaktawar*[3] not followed. [The case has been overruled by *Roshan Singh* v. *Matadin.*[4] The Calcutta and the Bombay decisions are also against the view taken in the case under notice. *Hurri Pershad* v. *Nasib Singh*,[5] *Tukaram* v. *Babaji.*[6]—Ed.]

Gandarp Singh v. Sheo Darshan Singh.—I.L.R. 12 A. 571.—Where a decree had been transferred for execution to another Court and that Court sanctioned an agreement between the parties for satisfaction of the decree by instalments :—*Held*, that the latter Court had no authority under S. 257-A to sanction the agreement[7]; further, that an order of the Court passing the decree once more transferring it for execution upon an application reciting such agreement and sanction could not be treated as an order sanctioning the agreement.

1. (1895) I.L.R. 20 B. 569.
2. (1882) I. L. R. 4 A. 316.
3. (1885) I. L. R. 7 A. 327.
4. (1903) I. L. R. 26 A. 36 at 38.
5. (1894) I.L.R. 21 C. 542.
6. (1895) I. L. R. 21 B. 122.
7. [See *Paramananda Das* v. *Mahabeer.* (1896) I. L. R. 20 M. 378 :— Ed.]

An agreement sanctioned under S. 257-A cannot be treated, without more, as a decree of Court and cannot have effect as an order under S. 210; but an order under S. 210 would operate as a sanction under S. 257-A.

Ram Lal v. Chhab Nath.—I. L. R. 12 A. 528.—Where each party appealed separately and the defendant's appeal was first heard and an issue as to the defendant's title was decided against him:—*Held*, that the trial of same issue in the appeal of the plaintiff subsequently heard was barred by the principle of *res-judicata* though not by S 13, C. P. C. [Cf. *Panchanadhvelan* v. *Vaithinatha Sastriar.* [1]—Ed.]

Harakh v. Ram Sarad.—I. L. R. 12 A. 579.—In an original suit of the nature cognizable by a Court of Small Causes the subject did not exceed Rs. 500 in value. *Held*, no second appeal will therefore lie in respect of an order in execution of the decree in the suit whether the proceedings are taken in the Court which passed the decree or in that to which it may be transferred for execution. *Nazar Husain* v. *Kesri Mal* [2] followed. [See also *Din Dayal* v. *Patrakhan*, [3] *Aithala* v. *Subbanna* [4] *Lala Kandha Pershad* v. *Lala Lal Behary Lal* [5] and *Shyama Charan Mitter* v. *Debendra Nath Mukerjee.* [6]—Ed].

Queen Empress v. Sundar Singh.—I. L. R. 12 A. 595.—A confession recorded in proper from by a Magistrate in a Native State, of certain offenders in British territory was held admissible under S. 80 of the Evidence Act. *Semble*. S. 74 would also render the confession admissible. [See *Queen Empress* v. *Nagla Kala.* [7]—Ed.]

Bangaru Sami v. Bala Subramanian.—I. L. R. 13 M. 496. —This was a suit upon a foreign judgment for the price of goods purchased by the defendants in such foreign territory. The defendants neither resided, nor owned property in the foreign
[*59] *territory and did not appear at the Court and had no actual notice of the proceedings in the foreign Court. *Held* that the absence of notice was fatal to the suit.

Semble.—In the circumstances of this case the foreign Court would have no jurisdiction unless there was a promise to pay the purchase money in the foreign territory.

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1. (1905) 16 M.L.J. 63; I.L.R. 29 M. 333. F. B.
2. (1890) I. L. R. 12 A. 581.
3. (1896) I. L. R., 18 A. 481 (F. B.)
4. (1888) I. L. R. 12 M. 116,
5. (1898) I. L. R. 25 C. 872.
6. (1900) I. L. R. 27 C. 484 (487, 488).
7. (1896) I. L. R. 22 B. 235 (237, 238).

[*See Moazzim Hossein Khan* v. *Raphael Robinson*[1] and Cf. *Annamalai Chetti* v. *Murugesa Chetty*.[2]—ED.]

Armugam *v.* **Kandarsa Menon and another.**—In S.A. No. 766 of 1885, the Madras High Court decided that a *marupat* (duplicate of kanom document kept by a jenmi in former times when it was not usual to take kaichits or muchilikas from tenants) is primary, not secondary evidence of the kanom demise. The Courts in Malabar have continued to treat *marupats* as mere copies and therefore as secondary evidence, the decision referred to not being yet reported.

Subramanya Bharatikal *v.* **Appukuth Panikar and others.**—In C. R. P. 387 of 1889 the question arose whether in a suit to redeem a kanom in computing the valuation of the suit and determining the Court which has jurisdiction to try it, the arrears of purapad claimed by the jenmi should be added to the kanom amount, or whether the arrears of purapad may be set off againt the kanom amount due to the tenant and the Court fees and valuation for purposes of jurisdiction determined by the difference. The Court consisting of *Muthusami Aiyar* and *Weir* J J. held that the latter was the correct view. The practice hitherto in the Courts of Malabar has proceeded on the opposite view.

SUMMARY OF ENGLISH CASES. * [*49]

Onslow *v.* Commissioners of Inland Revenue.

[25 Q. B. D. 465.]

Distinction between judgment and order.

In this case the question was whether, with reference to the period of limitation prescribed for an appeal by the Stamp Act of 1870, the decision of a Divisional Court on a case stated by the Commissioners of Inland Revenue under S. 19 of the Stamp Act, was an *order* or a *judgment*. The Court of Appeal, following *Ex parte Chinery* [3] held that it was an order and pointed out the distinction between an order and a judgment.

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1. (1901) I. L. R. 28 C. 641 : s. c. 5 C. W. N. 741.
2. (1903) I.L. R. 26 M. 544 : s. c. L. R. 30 I. A. 220.
3. (1884) 12 Q. B. D., 342.

A *judgment* is said to be a decision obtained in an action, and every other decision an *order*. Cf. S. 2, Civil Procedure Code.

Cullerne *v.* London and Suburban General Permanent Building Society. [25 Q. B. D. 485.]

Remoteness of damage—Difference between "causa causans" and "causa sine qua non"—Responsibility of director for wrongs of co-directors.

Here a director of a society was sought to be made liable for losses sustained by it by reason of advances made to members on the security of their shares, the advances having been authorised by a general resolution of the directors which, however, was *ultra vires.* The defendant had concurred in the original resolution, but had not authorised the specific advances in respect of which he was alleged to be liable. The Court of Appeal decided that he was not liable, on the ground that though but for the resolution no such advances would have been made, the losses were really caused not by the resolution, but by the particular advances,
[*50] which were new wrongful acts by independent * persons; that the resolution was not the *causa causans* of the loss, but only a *causa sine qua non.* It was further observed "that the resolutions were not orders given to subordinate officers to carry out, but merely expressed the views of the directors as to their own powers, and their views of what should be done as regards advances; that the co-directors who acted on the resolution were not his servants or agents, but had as great authority as himself and the same knowledge, and that even assuming that he misled them on a point of law, it did not make him liable to the society for the loss of money, which *they* advanced and not *he.*"

Gordon *v.* Silber. [25 Q. B. D., 491.]

Hotel-keeper's Lien.

A hotel-keeper, who received a husband and wife into his hotel with a quantity of luggage, was held to have a lien over the luggage for the balance of his bill, although he gave credit to the husband, and the luggage was the separate property of the wife, the reasons being, that he was not aware which of the goods belonged to the husband and which to the wife, and under the

common law relating to inn-keepers, he could not inquire into their respective titles to the goods, but was bound to receive them and their goods, and keep the goods safely and securely, and that the lien would have attached even if the goods had been stolen by the guest.

Marks *v.* Beyfus. [25 Q. B. D., 494.]

Privileged Communications.

In an action against private individuals for maliciously conspiring to cause the Director of Public Prosecutions to institute a prosecution, the Director of Public Prosecutions was called as a witness by the plaintiff and asked to give the names of his informants and the nature of the information. The Director declined, and the Court of Appeal held that the question was rightly disallowed. *Held*, that the prosecution was a public prosecution; that in such a case a witness cannot be asked such questions as will disclose the informer ; that the rule may be departed from where, on the trial of a prisoner, the judge is of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence ; that except in this one case, the rule is not a matter of discretion but of law, and that the privilege does not depend on the witness claiming it, but the judge should disallow the question as soon as it is asked.

Bishop *v.* The Balkis Consolidated Company. [25 Q. B. D. 512.]

Liability for careless misrepresentation—Estoppel.

The practice obtained in the defendant's company of certificating transfers of shares in cases where the seller's certificate included more shares than he sold. In such cases the seller did not deliver the certificate to the buyer, but produced his certificate and transfer to an officer of the company, who certified on the transfer "certificate lodged." The certification was tantamount to a representation that the transferor had produced to the person certifying documents showing a *prima facie* title in himself. A shareholder transferred his shares to a person and lodged the share certificate with the company to complete his title. The shareholder again professed to transfer the share to a third person from whom the plaintiff purchased them. The transfer to the plaintiff was

certificated by the company in the usual way and the plaintiff paid the price, but discovered that his vendor had acquired no title. The defendant's company refusing to recognise the plaintiff subsequently as owner of the shares, the plaintiff sued for their value and urged among other grounds that he had acquired a right by estoppel against the company for the value of the shares. The Court of Appeal, following *Peek* v. *Derry*, [1] *held* that no action lay for the careless misrepresentation; that the Company
[*51] pany * could plead the invalidity of the transfer to plaintiff's vendor; that the doctrine of estoppel could not put the defendant in a worse position than if the certificate of transfer to plaintiff's vendor had been produced, and that even if the fact which the defendant's company were estopped from denying were true, the plaintiff could not have a valid title.

Lister & Co. *v.* Stubbs. [45 Ch. D. p.]

Principal's right to the corrupt gains of the agent—Following money into its investment.

A manufacturing company employed an agent to purchase for them materials used in their manufacture. The agent bought materials from a firm from which he corruptly obtained a commission and he invested a portion of the amount so received. The principal sued the agent for the money received by him as commission and claimed to follow it into the investment. They applied for an injunction to restrain the defendant from dealing with the investment, or for an order directing him to bring the money and the investment into Court.

Stirling J. held that the plaintiffs could not follow the investment and were not entitled to the order, as the relation between the parties was that of debtor and creditor and not that of trustee and *cestui que trust*. *Stirling* J. adopted the dicta of *Cotton* L. J. in *Metropolitan Bank* v. *Heiron*, [2] as furnishing the proper test in such cases, *viz.*, whether the *cestui que trust* sought to recover money which was his own before any wrongful act by the trustee, or whether his title depended on its being established by a decree of a competent court that the fraud of the trustee has given the *cestui que trust* a right to the money. *Stirling* J. further laid down that it was not true that in every case where an

1. (1889) 14 A. C. 337. 2. (1880) 5 Ex. D. 319.

action for money had and received would lie, the money in the hands of the defendant could be followed into its subsequent investment.

In re **Parsons:—Stockley** *v.* **Parsons.** [45 Ch. D. 51].
Spes successionis.

Held by *Kay.* J. that a *spes successionis* is not even a contingent title to property under the English law; that the maxim "nemo est hæres viventis" should be construed literally, and that there is no such character in law as the heir of a living person or as his statutory next of kin. A gift to such of the children, or nephews, or even kindred of *A* as shall be living at his death differs greatly from a gift to those who shall *then* be his statutory next of kin. In the first there is probably a contingent interest; in the second none.

In re **Ware:—Cumberlege** *v.* **Cumberlege-Ware.**
[45 Ch. D. 269].
Power of appointment by Will.

The principle laid down in Jarman on Wills, Vol. 2, 4th edn., p. 265, was approved "where a power is given by will to appoint property among several objects, and the subject, in default of appointment, is given to them individually as tenants in common, if all the objects survive the testator and one of them afterwards dies in the lifetime of the donor of the power, the power is not defeated *pro tanto*, but remains as to the whole.

Lewis *v.* **Lewis.** [45 Ch. D. 281].

Compromise of suit by Counsel.

Though a compromise entered into by counsel without any instructions or authority other than such instructions and authority as are implied in the employment of counsel is binding on the client; a compromise arranged by counsel to give effect to an intention to compromise conceived by the parties or their legal advisers in the country, but by some misapprehension departing from their instructions as to the compromise is not binding on the client.

[*52] *** Morris v. Edwards.** [15 A. C. 309].

Sufficiency of affidavit—Documents relating to title contradicting affidavit.

An affidavit of documents by a defendant objected to the production of certain documents on the ground that they related solely to his own title, and did not in any way tend to prove or support the plaintiff's title. It was held that the affidavit was sufficient and need not allege that the documents did not impeach the defence, and that the plaintiffs could not contradict and get behind it by a contentious affidavit.

Montaignac. v. Shitta. [15 A. C. 357.]

Scope of agent's authority to borrow—Lender's duty to enquire.

An agent who has implied authority to raise moneys necessary for the purpose of carrying on his principal's business would also have authority to raise them on exceptional terms under special circumstances; and if the occasion might have arisen when his borrowing powers would have been properly interpreted as comprising recourse to extraordinary means, it would not be incumbent on a lender to inquire whether in the particular case the emergency had arisen or not; but if he acted in good faith and without notice that the agent was not obeying or intending to obey the mandate of his employers, the loan would be binding on the principal.

Railton v. Wood. [15 A. C. 363.]

Construction of Statute—Scope and policy of the law—Preamble a help to interpretation.

The owner of a hotel in New South Wales, on the 2nd August 1887, distrained the goods of his lessee for arrears of rent and impounded and made an inventory of them. On the 4th August the tenant committed an act of insolvency and his estate was vested in the Official Assignee who gave notice to the distrainer of the sequestration and his appointment, but did not interfere with the distress.

On the 8th August, the defendant forcibly removed the goods from the custody of the distrainor justifying his action on the ground that the goods had become his property under a bill of

sale executed by the tenant on the 7th of May before the distress. The distrainor brought this suit for damages against the defendant for pound breach and removal. The question was whether the defendant was justified in taking the goods out of the plaintiff's possession after the order for sequestration; and this depended on the construction to be placed on the 41st section of the Colonial Insolvent Act 5, Vict. 17, which provided : " No distress for rent shall be made or levied or proceeded in, after any order made or sequestration as aforesaid ; but the landlord or party to whom the rent shall be due shall be entitled to receive out of the assets of the estate so much rent as shall then be due, not exceeding six months' rent on the whole, and shall be allowed to come in as a creditor and share rateably with the other creditors for the overplus."

Held, following *Hill* v. *East and West India Dock Co.*,[1] that a statute must be so construed as, if possible, to avoid the extension of it to collateral effects and consequences, beyond the scope of the general object and policy of the statute itself, and injurious to third parties, with whose interests the statute need not and does not profess to directly deal.

The words of the statute in prohibiting " distress for rent" were very general. Did they mean all goods on the premises liable to be distrained by the insolvent's landlord, no matter whose property they were, or only those goods which formed part of the estate to be administered ?

Their Lordships of the Judicial Committee examined the preamble and provisions of the statute to ascertain its purview and policy, and held that its policy was to * place limi- [*53] tations on the exceptional remedy of the landlord only when and so far as it came into competition with the interests of the general body of the creditors, and to substitute for it payment of the rent in full for six months, leaving the landlord to a right of proof for the rest, and that since the payment in full was to come out of the assets of the estate, the reasonable inference was that the remedy taken away was one which was in force as against the estate and not against the goods of a third party. In the present case, the goods having become the property of the

1. (1882) 22 Ch. D. 14.

defendant, the distress was held valid and not affected by the insolvency and the pound breach held to be not justified.

O'Rourke *v.* Commissioner for Railways.
[15 A.C. 371.]

Award—Admissibility of evidence of arbitrator.

Held, following *Duke of Buccleuch* v. *Metropolitan Board of Works*, [1] that an arbitrator might be asked by the Court what course the argument before him had taken, what claims were made and what claims were admitted, so that the Court might be in possession of the history of the litigation before the arbitrator up to the time of award ; but that the right of questioning the arbitrator then ceased, that the award must speak for itself, and that the evidence of the arbitrator was not admissible to explain or aid, much less to attack or contradict, what was to be found upon the face of that written instrument.

Barton *v.* Bank of New South Wales. [15 A. C. 379].

Collateral evidence to shew nature of the transaction.

Collateral evidence, whether antecedent, contemporaneous, or subsequent to, or with, the transaction, is admissible to show that a document which is on the face of it an absolute conveyance, is only a mortgage. See *Venkataratnam* v. *Reddiah*[2] and cases there cited.

Lyons *v.* Hoffnung. [15 A. C. 391].

Carrier—Stoppage in transit.

Held, following *Bethell* v. *Clark* [3] that where goods pass direct from the hands of the vendor into the hands of a carrier to be carried to the destination then contemplated by both vendor and purchaser, so long as the goods are in the hands of the carrier as such and for the purposes of transit, the goods are in transit and may be stopped by the vendor, though the carrier is the purchaser's agent to accept delivery so as to pass the property.

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1. (1871) L. R. 5 H. L., 418. 2. (1890) I. L. R. 13 M. 494.
3. (1888) 20 Q. B. D. 615.

Sanitary Commissioners of Gibraltar *v.* Orfila.

[15 A. C. 400.]

Liability of public body for tort—Statutory duty towards plaintiff.

The dictum in *Mersey Docks* v. *Gibbs*,[1] that "in every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created," was approved. It is an implied condition of statutory powers, that, when exercised at all they shall be executed with due care. But in the case of mere non-feasance, no claim for reparation will lie except at the instance of a person who can show that the statute or ordinance under which they act, imposed upon the Commissioners a duty towards himself which they negligently failed to perform.

In re North Australian Territory Company.

[45 Ch. D. 87.]

Discovery—Production of documents—Duty to answer—Companies Act 1862, *S.* 115.

The liquidator of a Company voluntarily wound up with the leave of the Court obtained an order in an action against another Company calling upon the defendant's secretary to make an affidavit of documents. But an application for production of documents and for the administering of interrogatories to the defendant's Company to be answered by its officers, was held premature, as no defence had been put in.

* An order was then obtained by the liquidator under S. 115 of the Companies Act 1862 (25 & 26 Vict. c. 89) for examination of the defendant's secretary before the examiner. The secretary did not appeal from the order, but in the course of his examination declined to answer questions relevant to the matters in issue. *Held*, that as the question did not tend to assist the interests of the Company in any way except by assisting it to get judgment in the liquidator's action, it would be wrong to allow the liquidator under S. 115 to get by a side-wind discovery and inspection which had been held premature. [*54]

1. (1864) L. R., I. H. L. 93.

Tilbury *v.* **Silva.** [45 Ch. D. 98.]

Profit à prendre—Prescription—Grant of bank—Right to bed of a river.

1. A right in the nature of a profit *à prendre* cannot be claimed by prescription on behalf of a large and indefinite class, such as, for instance, owners and occupiers of copy-hold tenements.

2. It is a law of conveyancing that *prima facie* where a man grants land on the bank of a river, having himself the soil *ad medium filum*, without any words describing the boundary to be the *medium filum*, the soil *ad medium filum* passes by the *grant.*

3. The enfranchisement of a copy-hold destroys all customary rights attached to the copy-hold interest.

Rendall *v.* **Blair.** [40 Ch. D. 139.]

Leave to sue when to be obtained—Charitable Trusts Act 1853, *S.* 17.

The master of a charity-school founded under 4 & 5 Vic., c. 38, sued the managers in the Chancery Division for injunction to restrain them from dismissing him from his office, and from appointing any other person to such office and from ejecting him from the school-house. The defendants contended that leave to sue not having been obtained under S. 17 of the Charitable Trusts Act 1853 (16 & 17 Vic., c. 137) from the Charity Commissioners, the suit should be dismissed. The 17th section provided that "before any suit, petition or other proceeding for obtaining any relief order, or direction concerning or relating to any charity or the estate, funds, property or income thereof shall be commenced, presented, or taken by any person, he shall give notice in writing to the said Board of the proposed suit, petition or other proceeding, and the Board may authorise it and no suit, petition or other proceeding shall be entertained or proceeded with by the Court of Chancery except upon an order or certificate of the Board, provided that the enactment shall not extend to or affect any such petition or proceeding in which any person shall claim any property, or seek any relief adversely to any charity."

Held:—(1) That the words, 'suit, petition, or other proceeding' not being at the date of the statute apt words for dealing with or

describing common law actions, no action brought solely to enforce a common law right or to obtain equitable relief in respect of such right, is within the section.

(2) That the section does not apply even to cases of individual equitable rights not relating to the administration of the trusts of the charity, and that it applies solely to cases where administration is sought.

(3) That in the present case, the suit being one merely to obtain equitable relief in respect of a common law right, the leave of the Commissioners was not necessary.

(4) That even if the consent of the Commissioners was necessary, the suit should not be dismissed but allowed to stand over until that consent, which as a matter of duty ought to be obtained in the first instance, is obtained at last, in as much as the section contained no words to the effect that the suit should be dismissed if the consent was not obtained beforehand.

***In re Porter's Settlement—Porter v. Dequetteville.** [*55]

[45 Ch. D. 179.]

Appointment of lesser estate under power.

A power to appoint real estate among children in tail does not authorise an appointment to one of those children for a lesser estate, such as an estate for life.

Marquess of Northmpton v. Pollock. [45 Ch. D. 190.]

Clog on redemption.

An agreement restraining the right of redemption between a mortgagor and a mortgagee is invalid.

Mellersh v. Brown. [45 Ch. D. 225.]

Subsequent interest recoverable as damages—Statute of limitation.

A reversionary interest in personal property was mortgaged on the 24th April 1875 with a covenant for payment of principal on the 24th October 1875, with interest at 5 per cent. down to that day, but there was no covenant for payment of subsequent interest in case of default. No interest was ever paid, and in December

1889 the mortgagee applied for foreclosure. The mortgagor contended that subsequent interest could be recovered only by way of damages, and that there being no statute of limitations applicable to the case, not more than six years' interest should be allowed by way of damages on the analogy of the statute, 3 & 4 Will. 4, C. 27, S. 42, applicable to charges on land. It was decided that there was no such analogy, and that the mortgagor should not be allowed to redeem except by payment of interest at 5 per cent. for all the 14 years. [*Smith* v. *Hill*[1] followed.]

In re Alsbury—Sugden *v.* Alsbury. [45 Ch. D. 237.]

Tenant for life—Company—Increase of capital.

A testator bequeathed certain shares in a Company to his widow for life with remainder to his children. When the testator died in 1884, the Company had a reserve fund of £3,000. In October 1888 the reserve fund rose to £9,000, but in October 1889 the fund sank to £2,000. In April 1889 £15,000 had been paid as *interim* dividend, or 50 per cent. of each share. Even supposing that the whole of the £7,000 which had disappeared from the reserve fund had gone towards payment of the dividend, the whole of the amount so divided was held to be income and not capital, and, therefore, to belong to the tenant for life. The following principles laid down in *Bouch* v. *Sproule*[2] were applied.

1. " When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a Company which has the power either of distributing its profits as dividend or of converting them into capital, and the Company validly exercises this power, such exercise of its power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the Company as dividend goes to the tenant for life, and what is paid by the Company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital. " Per *Fry*, L. J.

2. Where a Company has power to increase its capital and to appropriate its profits to such increase, it cannot be considered as having intended to convert, or having converted, any part of its profits into capital when it has made no such increase, even if a

1. (1878) 9 Ch. D. 143. 2. (1887) L. R. 12 A. C. 385.

Company having no power to increase its capital may be regarded as having thus converted profits into capital by the accumulation and use of them as such." Per Lord *Herschell.*

3. The above rules obtain "whether the profits with which the Company is dealing belong to the current year, or have been previously reserved for the purpose of its business." Per Lord *Watson.*

4. *A partnership, whether ordinary, or incorporated, differs [*56] from a sole trader in this respect among others, *viz.*, "that the undivided profits of any period, a year, or shorter, or longer, continue to be undivided profits, unless something in the articles of partnership or some agreement by all the partners makes them capital." Per Lord *Bramwell.*

JOTTINGS AND CUTTINGS.* [*21]

We commend the following to the attention of judges and practitioners in this country :—

Retirement of Lord Justice Cotton.—Lord *Esher*, M. R. (*Lindley*, *Bowen*, *Fry* and *Lopes*, L. J. J., being also present), addressed the Bar as follows :—The words which I am about to address to you are the considered words of every member of the Court of Appeal. They will thus have the greater weight. We have come into this Court, where Lord Justice *Cotton* so long presided, in order to make known to you all our deep sorrow at the greatest loss which could have happened to the Court of Appeal. Lord Justice *Cotton* has been obliged through ill-health to resign his high office, and his resignation has been accepted. His health broke down entirely from the strain put upon him by his assiduous, unswerving attention to his judicial duties. Lord Justice *Cotton* came to this Court straight from the Bar. He was the undisputed leader, in fact, of the Chancery Bar. We soon found that his knowledge of equity law was almost absolutely complete. Its principles, its practice, its details, its decisions, its application, he had always ready. His powers of exposition and explanation were lucid in the highest degree. What invaluable assistance such powers gave to us, his colleagues, none of you can fail to appreciate. As a great lawyer, his predominant virtue was accuracy. *As a Judge, his appreciation of law and facts was instantaneous, yet his theory, often pressed upon us or some of us, always practised by himself, was that all counsel should*

be heard to the fullest limit of what they desired to say, not only to the extent of the Court being certain that it had heard all that could reasonably be urged, but so that the the parties might be satisfied that all had been said to the Court which they desired should be brought to its attention. As a great Judge, patience and justice were his predominant virtues. His knowledge, quickness, lucidity, and inexhaustible patience made him as great and just a Judge as has ever adorned the Bench. I must point out something more. He came into this Court when the joint administration of the two systems of law and equity was still unformed. Two sets of Judges of equal talent, equal independence, equal conviction, and equal pride were to be brought, if possible, without either side yielding to the other, to look at each of the systems with the same eyes. [*22] This could only* really be brought about if each set, as to its own former system, would learn to regard it, not only as it had seemed to its practitioners before that it should be regarded, but also as it was regarded by the new minds now brought to bear more particularly upon it. The new point of view, the joint point of view, brought about by the fair contact of the two sets of minds, might be different from, but better than either of the former and narrower points of view. Two remarkable Equity Judges—Lord Justice *James* and the late MASTER OF THE ROLLS—had approved and acted upon this view. From the moment that Lord Justice *Cotton* found that all the members of the Court of Appeal were intent, not upon encroachment, not upon the alteration of either law, but only on the discovery of a joint appreciation of each, he adopted that desire without reserve, assisted its attainment by his unrivalled skill, and has helped us almost, if not quite, to realize it. In all ways we acknowledge with gratitude his superiority and his invaluable aid. We are here to testify our esteem and our affection, and, as I said at the beginning, our sorrowful sense that the Court of Appeal has suffered the greatest loss which could have happened to it.

Sir R. Webster, A. G., on behalf of the Bar, replied:—My Lord—Nothing that I can say can add to the value of the graceful testimony which your Lordship has given to the loss sustained by this Court. The profession is grateful to your Lordship for allowing them, through my voice, the opportunity of expressing, on behalf of the Bar, the regret which they feel at the retirement of the Lord Justice, and their sense of the loss which they have

sustained. My Lord, as I have said already, I cannot worthily add anything to that extraordinary tribute. I respectfully adopt, so far as the profession of the Bar is concerned, every word that has fallen from your Lordship; and yet, my Lord, it may not be unfitting that in a very few sentences I should explain to your Lordship, and through you to *Sir Henry Cotton*, whom I can no more address in public, the feelings which strike us as members of the profession from which he has now retired. My Lord, the career of *Sir Henry Cotton* is one which might be a study to every public-school man, to every public-school boy, to every University man, and to every student at the Bar. Coming to us as a Newcastle scholar at Eton, gaining at Christ Church, Oxford, all but the highest honours, he has added a name to the almost endless roll of great names of which those *two ancient foundations proudly boast, and to the Bar he brought [*23] that extraordinary industry, that wonderful clearness of reasoning, which has already been referred to more appropriately by your Lordship. My Lord, his career at the Bar, at which for thirty years he practised, is known to all who hear me, and, as your Lordship has already said, those who remember him there, and particularly who remember him as almost the leader, if not the leader, of the Bar in the House of Lords and at the Privy Council, as well as in the Court of Chancery, will remember also the compliments worthily, deservedly, and frequently paid to the force of the arguments which he addressed to the Courts in which he was engaged. My Lord, those who knew him felt then, as I feel now, that a more honourable advocate has never adorned the English Bar. Then, my Lord, upon the Bench, called as your Lordship has said, at once from the Bar to the position of a Lord Justice of Appeal, he, in that new field, fulfilled the expectations formed from his previous career. It strikes us—it has always struck us—that he was, as a lawyer, learned, clear, and accurate; as a judge, patient and courteous; and as a man, considerate and forbearing. Your Lordship, indeed, knows the strength which has been given to this division (if I may use the expression) of the Court of Appeal, since it has had the good fortune to have as its president Lord Justice *Cotton*. I should like to say one word, founded on intimate knowledge shared by Bench and Bar, that there was no member of our profession who more kindly guarded its best interests, or strove more earnestly to make it present to the young

student, every possible advantage so as to lead him to become a sound and skilful member of it. As I cannot speak to him again in public, I hope that some of your Lordships may be able to convey to him in our own words this message of the Bar. expressing our deep regret at his retirement, our appreciation of the loss which the Bench has sustained by his withdrawal from it, and conveying to him for us this genuine expression of our earnest affection and esteem.

[*61]

* THE AGE OF CONSENT BILL.

The question of raising the age of consent is exercising the minds of our countrymen very much, at the present moment. The bill, which was recently introduced by the Legal Member in the Supreme Council, is a short one. It proposes that in S. 375 of the Indian Penal Code, in the clause marked 'fifthly,' and in the exception, the word 'twelve' shall be substituted for the word 'ten,' and in the Schedule II to the Code of Criminal Procedure, for the entry respecting S. 376 of the Indian Penal Code, the following shall be substituted:

Col. 1.	Col. 2.	Col. 3.	Col. 4.	Col. 5.	Col. 6.	Col. 7.	Col. 8.
376	Rape— If the sexual intercourse was by a man with his own wife.	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Transportation for life or imprisonment of either description for 10 years and fine.	Court of Session.
	In any other case.	May arrest without warrant.	Warrant	Not bailable.	do.	do.	do.

Rape is defined in S. 375 of the Penal Code as follows:—"A "man is said to commit 'rape' who, except in the case herein-"after excepted, has sexual intercourse with a woman, under cir-"cumstances falling under any of the five following descriptions." The fifth description is 'With or without her consent when she is' 'under ten years of age.' The exception is "sexual intercourse by a man with his own wife, the wife not being under ten years of age;" such intercourse is not rape. The proposed amendment is, that sexual intercourse with a girl, with or without her consent, when she is under twelve years of age, is rape, and the exception

to the rule as amended, would make sexual intercourse by a man with his own wife, the* wife not being under twelve years of age, [*62] not rape. The punishment for this offence, which is left unaltered, is transportation for life, or imprisonment of either description for a term which may extend to ten years, and also fine. The object of the amendment of the 2nd Schedule of the Criminal Procedure Code is, to make the offence of rape, when committed by a husband on his wife, a bailable one, for which a summons shall be issued in the first instance, and the offender shall not be arrested by the Police without a warrant. The reason for the proposed alteration of the law is stated by the Honourable *Sir Andrew Scoble* to be this :—The limit at which the age of consent is now fixed, favours the premature consummation by adult husbands, of marriages with children, who have not reached the age of puberty, and is thus in the unanimous opinion of medical authorities, productive of grievous suffering and permanent injury to child-wives, and of physical deterioration in the community to which they belong. In order to prevent the possibility of vexatious and unjustifiable interference with the domestic concerns of respectable people, which might result from raising the age of consent, the proposal is made, to withdraw the offence of rape, when alleged to have been committed by a husband on his wife, from the cognizance of the Police. It may not be out of place to refer here to some of the general principles laid down in the Penal Code, in regard to the commission of offences. S. 83 states, that nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion. S. 87 says that nothing which is not intended to cause death or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence, by reason of any harm which it may cause, or be intended by the doer to cause, to any person above eighteen years of age, who has given consent, whether express or implied, to suffer that harm, or by reason of any harm which it may be known by the doer to be likely to cause, to any such person who has consented to take the risk of that harm. S. 90 states, that a consent is not such a consent as is intended by any section of the Code, if the consent is given by a person, who from unsoundness of mind or intoxication, is unable to understand the nature

and consequence of that to which he gives his consent, [*63] *or, unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age. In regard to this clause Mr. Mayne says: 'Where the act if done without consent would be an offence, the fact that such a consent was given by a child under twelve years of age, would be no justification, unless the contrary appears from the context. The contrary does appear from the context in cases of rape [1] when the age of consent is reduced from twelve years of age to ten years.' The proposal now before the Supreme Council is, to remove this exception to the penal law. From the principles above enunciated, it is clear that, even as the law now stands, if a husband has intercourse with his wife, in such a violent and brutal manner, that it results in her death or suffering grievous hurt,—such hurt for instance as endangers her life or causes her to be in severe bodily pain for many days—then the husband can be punished under the Penal Code—*Queen Empress* v. *Hurree Mohun Mythee* [2]—and it would be no justification for him to say that he did the act with her consent, and even if he causes simple hurt, and the girl is less than twelve years of age, he can be punished. Supposing he is suffering from some loathsome disease and communicates it to his girl-wife the law can punish him if the girl herself or her relatives prosecute him for it. Compare *The Queen* v. *Clarence* [3] and *Queen Empress* v.

1. [NOTE:—Is the case of Rape the only one where the contrary appears in the context? According to the Penal Code, S. 319, hurt is caused to any person when bodily pain, disease or infirmity is caused to any person, and according to Ss. 349 and 350, if a person touches another without that person's consent, criminal force is said to be used. According to the exception before the amendment, sexual intercourse by a man with his wife under twelve years of age is not rape. From the passage cited from Mr. Mayne's book, it may be inferred that this is the only exception. If so, sexual intercourse by a man with his wife under 12 years of age, though it would not be rape prior to the amendment, would at least constitute criminal force. We do not, however, think that this was intended by Mr. Mayne, or even if it was intended by him it would represent the law correctly.

S. 90. speaks of a consent given by a child under 12 years of age. It has no application to the case of a consent which can be given under the law by the guardian of a minor. That is referred to in S. 89, I. P. C.

Sexual intercourse by the husband with a child under 12 years of age is not unlawful or illegal and does not consititute rape; it cannot constitute any other offence. Under the personal law of the Hindus, the husband is the legal guardian of his wife.—ED.]

2. (1890) I. L. R. 18 C. 49.

3. (1888) 22 Q. B. D. 23.

Rakma Kom Sadhu. [1] But it is a compoundable offence. [2] The law, as it stands, further makes the mere act of having intercourse with one's wife, when she is less than ten years of age, punishable, irrespective of her suffering or not any bodily pain or injury, and if the law is altered as proposed, the act would be punishable, if she is less than twelve years of age. We perfectly agree with *Sir Andrew Scoble* in thinking that the premature consummation of marriage, by adult husbands with children who have not reached the age of puberty, is productive of great harm, and that this practice must be put a stop to, in the interests of the girls themselves, and of the community of which they are members.

The argument based on the Shastras, in Bengal, is not one that carries much force with it. One cannot justify the doing of what is wrong by appealing to the Shastras. A witness who perjures himself to save the life of a Brahmin, who is guilty of murder, cannot hope to get off in a British Court of Justice, by pleading that the *Shastras enjoin him to perjure himself for such [*64]
a purpose, nor can any man in British India, even at this moment, justify himself for doing such injury to a little girl, as causes death or grievous hurt to her, on the pretext that the Shastras enjoin him to have sexual intercourse with her, immediately after she begins to menstruate. Our own firm conviction is, that the Shastras, if rightly understood, do not enjoin any such foolish practice. A rational interpretation has been put on the Shastras both in this Presidency and Bombay. We can only express our deep regret at the strong agitation which has been set on foot in Bengal in support of the present practice, and we would draw the attention of our readers to the very able letter from the pen of Mr. Justice *Telang* on the subject and the collection of Sanskrit texts published by Dewan Bahadoor R. Ragunatha Row. There is, however, one point on which we have serious misgivings, and that is, whether the best way of bringing about the reform in question is by amending the section relating to rape. Mr. Justice *Stephen* defines rape as the act of having carnal knowledge with a woman

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1. (1886) I. L. R. 11 B. 59.

2. [NOTE.—That is, the offence of causing hurt or grievous hurt by doing any act, so rashly or negligently as to endanger human life or the personal safety of others. In these two cases, the compounding is only with the permission of the Court.—ED.]

without her conscious permission, such permission not being extorted by force, or fear of immediate bodily harm. But if such permission is given, the fact that it was obtained by fraud or that the woman did not understand the nature of the act is immaterial. He states on the authority of Lord *Hale*, that a husband cannot commit rape upon his wife by carnally knowing her himself, because the wife's consent at marriage is irrevocable. He, however, adds that the consent is confined to the decent and proper use of marital rights, but if a man uses violence to his wife under circumstances in which decency, or her own health, or safety, required or justified her in refusing her consent, he may be convicted of rape notwithstanding Lord *Hale's* dictum. The Indian law differs from the English law in the following respects:—Consent obtained from a woman through fraud or force when she is not capable of giving an intelligent consent, is of no avail, and a husband can commit rape on his wife when she is under ten years of age. There cannot be any doubt as to the wisdom of the alteration. When a man plays a trick on another's wife by personating her husband, and induces her to have intercourse with him, it cannot be for a moment said that she consented to the act being done by the personation, nor can it be said that there is consent on the part of an idiot, whose consent is produced by mere [*65] *animal instinct, and is not the result of ability to understand the nature and consequences of that to which she gives consent. Similarly, in the case of a husband having intercourse with his wife, who is under ten years of age, the wife cannot be said to have consented, as she from her tender years is incapable of judging of the nature and consequences of the act, and the harmful nature of the act itself is beyond all reasonable doubt. Though the other reasons which go to make rape such a heinous offence in the eye of law, visited at one time with death, are certainly wanting here, such as the mental anguish and bodily pain suffered by a woman, who is forced against her will to have intercourse with a man who has no right to claim it from her, the unmerited disgrace which she is subjected to in the eyes of others, and the disastrous consequences which would follow her in case the intercourse results in conception, the law is still justified in punishing severely the husband for inflicting permanent injury on his wife when she is merely a child. But it cannot be said, with the same certainty, that permanent and irreparable injury would be done to

the wife who is over ten years of age but less than twelve years, if her husband had intercourse with her. The practice is, no doubt, calculated to lead to physical deterioration in the community, and for that and other reasons must be put a stop to But the question is, whether the offence need be stigmatised as rape, and visited with the punishment awardable for committing rape. We think the more satisfactory course would be, to create it into a new offence and punish it with imprisonment extending up to two years or with fine or both, and take it out of the cognizance of the Police. It is also an important question for consideration, whether, having reference to the apprehensions that may reasonably be entertained, of a too rigorous enforcement of the law, and the institution of vexatious complaints at the instance of professional litigants and muktyars, and the undeniable disturbance of the peace and happiness of families, it will not be advisable to provide, that prosecutions cannot be initiated against the husband, without the previous sanction of the local Government, or of any authority to whom the local Government may delegate its power.

The fear expressed in many quarters, that if the bill becomes law, girls may often be compelled against their own and their parents' will, to subject themselves to what is often considered an indignity by Hindus, namely, a medical examination by male doctors, is without foundation; for there is no provision of law whatever *in this country, whereby any one can be made to under- [*66] go a medical examination compulsorily.

We think that this is a fit opportunity for amending the law relating to immoral connection with girls below the age of sixteen. S. 373 of the Penal Code has been construed, (*R.* v. *Shaik Ali*)[1] as not applicable to cases where a man has merely sexual intercourse with a girl, without any arrangement that the person of the girl shall be for some time completely in his keeping, and under his control and direction. But it is the duty of the State to protect young girls, under sixteen years of age, from being seduced from the path of virtue while they are still incapable of judging of the serious and disastrous consequences of such misbehaviour. The necessity for such legislation was felt in England long ago and it is time that some steps are taken in India, for the benefit of

1. (1870) 5 M. H. C., p., 473 followed in *Queen Empress* v. *Sukee Raur* (1893) I. L. R. 21 C., p. 97. But see *Queen Empress* v. *Ponrangam* (1885) Weir Cr, Rule, 4th Ed. p. 373 at p. 375.

these helpless girls. The new sections that we would propose for the consideration of the Legislature[1] in regard to the age of consent may be formulated as follows:—

(1) Any person who has sexual intercourse with his wife, the wife being under twelve years of age, shall be punished with imprisonment of either description, which may extend to two years or with fine or with both.

(2) Any person who unlawfully and carnally knows any girl under the age of twelve years, shall be punished with imprisonment of either description, for a term which may extend to ten years, and shall also be liable to fine.

(3) Any person who unlawfully and carnally knows any girl, being of or above the age of twelve years, and under the age of sixteen years, shall be punished with imprisonment of either description, for a term which may extend to five years, and shall also be liable to fine.

HINDU LAW—COMPETITION BETWEEN ILLEGITIMATE SON AND WIDOW.

We shall now deal with the question as to who is to be preferred,[2] where there is a competition between the illegitimate son of a Sudra and his widow.

In Regular Appeal 86 of 1865 (*Kulanthai Nachiar* v. *Ramamani Ammal*,[3]) the plaintiff, Ramamani, alleging herself to be the widow of Sivaswamy Thevar, sued on behalf of her
[*67] *minor son, for the property of the late Sivaswamy in the hands of Kulanthai Nachiar, admitted to the Marava widow of the deceased. The Madras High Court held, that Ramamani was not married to the deceased but was his concubine, that the son born by her to the deceased, was therefore illegitimate, and that the defendant being the widow of the deceased, she was entitled to succeed in preference to the illegitimate son. The decision was, however, reversed

1. [The Bill has been passed into law and it is doubtful whether the legal question has any present interest.—ED.]

2. [We think that there is some misapprehension in this matter. Whatever might have been the view taken in *Kulanthai Nachiar's* case and whatever might be the explanation of the actual decision in the said case, we do not think that, in the case of partible property the Madras High Court, ever since the decision in *Krishnayya* v. *Muthusami* (1884) I. L. R. 7 M. 407, could be taken to have considered the question as one of preference.—ED.]

3. (1866) 1 Mad. Jurist p. 223.

by the Privy Council, (see *Ramamani* v. *Kulanthai Nachiar*[1]) which held that Ramamani was the wife, and her son a legitimate son, of the deceased. It became, therefore, unnecessary to discuss the question, whether the widow or the illegitimate son of a Sudra, dying without legitimate sons, is entitled to succeed to his property. Messrs. *West* and *Buhler* in their well known book on Hindu Law, page 84, have expressed the opinion that the illegitimate son of a Sudra succeeds to the whole of his property, in preference to his widow.

The Bombay High Court discussed the question in the case of *Rahi* v. *Govind* [2] and accepted the view propunded by Messrs. *West* and *Buhler*. In the later case also of *Sadu* v. *Baiza*,[3] Chief Justice *Westropp* adhered to this opinion, though the point did not actually arise in the case.

The correctness of this view was questioned by the Madras High Court in the two cases of *Manoji* v. *Pandoji*[4] and *Parvathi* v. *Tirumalai*[5], though the question did not actually arise for decision in either of those cases. In the second case the court quoted with approval the decision in *Kulanthai Nachiar* v. *Ramamani Ammal*.[6]

The arguments used by Messrs. *West* and *Buhler* for the position taken up by them, may be briefly stated as follows:—(i) At one stage of the development of the Hindu law, the daughter's son was made equal to a man's own son, while the widow was still unprovided for, or reduced to a lower place. Yajnavalkya Smriti belongs to this stage.[7] According to his scheme, the daughter and the widow come in, after the sons of all classes. He obviously meant that in the absence of an *aurasa* son and of a daughter's son who was equal to a son, a Sudra's son by his slave should succeed. If he had intended to give to the Sudra's

1. (1871) 14. M. I. A. p 346: S. C. 17 W. R. 1. 2. (1875) I. L. R. I. B. p. 97.
3. (1878) I. L. R. 4. B. p. 37 at pp. 55 and 56.
4. (1885) I. L. R. 8. M. p. 557.
5. (1887) I. L. R. 10 M. p. 334 at p 346.
6. (1866) I Mad. Jurist p. 223. It does not appear either from the report in the Madras Jurist or from the report in Moore's Indian Appeals whether the pro-property in dispute was partible or impartible. From the report in 14 M. I A. p. 346, all that appears is that the Zemindar was a sub-division Zemindar of Ramnad.

7. The learned authors apparently lose sight here of the leading verse on Inheritance where Yajnavalkya places the wife as first in the line of heirs (*i. e.* obstructed, according to the commentators.)

daughter a place before his illegitimate son, he would not in the next line have placed the widow below that son, and the daughter
[*68] below the widow. *(ii) The right of the widow to succeed to her husband was based on the fact that she was his '*patni*' who shared her husband's sacrifices, and as a Sudra has no sacrifices to celebrate like the twice-born classes, he has no '*patni*' to share them.[1] (iii) The form of marriage applicable to a Sudra was the Âsura, or some even lower form. The Âsura form of marriage being one by purchase, gave to the wife no other status than that of a concubine. (iv) The applicability of the higher forms of marriage to Sudras was the result of later custom, and the different consequences of marriage according to different forms, being traceable to a time and custom, in which community of property between the married pair was not recognized, it is not surprising that the wife's right of inheritance should not be admitted, nor is it strange, that even the development of the purely Brahminic law which benefited widows in the higher castes did not embrace, in its full extent, the degraded Sudras, whom it left as it found them, while it readily adopted an existing custom in fâvour of illegitimate sons which appeared reasonable to those whose own heirs might be sons irregularly contributed to their families. (v) The only alteration intoduced by Vijnanasvara was his introducing the daughter before her son, under tenets probably intended to meet the case of no sons of the enumerated classes surviving, nor any son or grandson of such a son.

The Bombay High Court, holding the view that the rights of the illegitimate sons being dealt with in the part which precedes obstructed heritage, (सप्रतिबन्ध) they should be classed with the rights of the several kinds of sons to succeed to their fathers' estate, accounts for the inconsistency in bringing in the daughter and her son before the illegitimate son, and for the still greater inconsistency of the omission of the widow who precedes both of them in the order of succession, by saying that this was the result of one of those arbitrary arrangements, not uncommon in

1. [Here again, do the learned authors mean to suggest that the widow is not entitled to succeed to her husband in the case of Sudras, according to Yajnavalkya. If so, it is inconsistent with verse 153 (Chapter II, Vyavahara Adhyaya) where the sage expressly states that the rule propounded by him "is applicable to all classes." The rule being applicable to all classes, the Sudra's *patni* is entitled to take his estate on his death :—ED.]

Hindu law, rather than of logical sequence or consistency with the general scheme of inheritance.

The Madras High Court dissents from the view,[1] that among Sudras marriage was no more than concubinage. On the other hand, Hindu Law confers on the wife of a Sudra, a status distinctly superior to that of a concubine, though she cannot be married according to the higher forms of marriage,[2] nor acquire the right of assisting in sacrifices which can only be offered by a regenerate householder. The text of Baudhayana, on which WEST and BUHLER relied in support of * their theory, that marriage among Sudras meant no more than [*69] concubinage, is explained as merely referring to the ceremonial to be adopted when Vaisyas and Sudras are married. The omission of the widow by Vijñâneswara, when he mentions the daughter and daughter's son, is accounted for, on the grounds that he had already stated that, even if there were legitimate sons, the father's widow was entitled to a share, and it would be unnecessary, therefore, to mention her name in connection with the illegitimate son, and further the enumeration may not have been intended to be complete, or the omission may have been the result of oversight. An examination is made of the legal basis, on which the right conceded to an illegitimate son originally rested, and still rests, and the result of it is stated to be, that until the abolition of slavery by Act I of 1843, his position was merely that of a freed-man, and in that sense, inferior to that of the other members of the family, whose relationship was based on a legal marriage, and the special rule, which provided his getting a share, is considered as merely the allocation of a portion of the property of a separated father, in lieu of maintenance. This decision of the Madras High Court was referred to by the Bombay High Court in *Shesgiri* v. *Girewa*[3] and an opinion expressed, that if at all, the widow is entitled only to share the property with the illegitimate son. This is the view expressed by Mr. MAYNE also (S. 507) but he is inaccurate in saying that the Madras High Court has taken the same view.[4] We venture to think that the

[1. Apparently, the case of *Parvathi* v. *Thirumalai* (1887) I. L. R. 10 M p. 334 is here referred to.—ED.]

[2. According to modern decisions the presumption is that even Sudras are married in the Brahma or approved form of marriage.—ED.]

3. (1889) I. L. R. 14 B. p. 282.

[4. We should think Mr. Mayne's analysis of the High Court's decision is strictly accurate. At page 343 referring to the earlier decisions of the Madras High Court, the learned Judges, in the aforesaid case of *Parvathi* v. *Thirumalai*

conclusion arrived at by Mr. MAYNE after his careful examination of the question is the correct one. We shall briefly notice the fallacy of the arguments, by which Messrs. WEST and BUHLER seek to maintain the contrary view. The argument grounded on the state of society at the time, when Yajnavalkya wrote his Smriti[1] is so fanciful and conjectural, that any argument based on it, for deciding the rights of parties in a Court of Justice, would be more calculated to mislead than to help in the settlement of their rights.

Further, there is nothing in the Smriti itself to authorize the supposition, that the author intended to provide for the daughter's son, while leaving the widow unprovided for. On the other hand, he provides for the wife getting a share, both in the lifetime of her husband, if he feels disposed to effect a partition with his sons (Vyavaharakanda, *Sloka* 115[2]) and also after her death, if the sons should effect a partition (*Sloka* 123[3]). He further [*70] *provides, that in case the husband dies without a son or other undivided co-parceners, the widow shall succeed in preference to the daughter, or parents, or brothers of the deceased. (Slokas 135 and 136[4]). When the author has so carefully provided for all the three contingencies, which are likely to arise, it would be unreasonable to suppose, that he intended that, in case the husband leaves behind illegitimate sons alone, and happens to be a Sudra, the widow shall go without any share at all. There is no indication in the book that Slokas 115, 123, 135 and 136 were intended to be applicable to the twice-born classes only. Nor is there any support in the Smriti for the view, that a Sudra has no

observed: "In both those cases, it was not doubted that the illegitimate son inherits the separate estate of his putative father on failure of a legitimate son, son's son, son's grandson, widow, daughter and daughter's son. Nor was it doubted that he is a co-sharer in such separate property with his legitimate brother and a co-heir with his father's widow, daughter or daughter's son. There is considerable authority, as observed by the Subordinate Judge, in support of those propositions of law."—ED.]

[1. We may add—apart from the question, whether the argument itself is well or ill-founded.—ED.]

2. Mandlik's Hindu Law, p. 212, 213. Mitakshara, Chapter I, S. 2, Cl. 8, Stokes' Hindu Law Books, p. 379.

3. Mandik, p. 216, 217. Mitakshara, Chap. I, S. 7, Cl. 1 & 2, Stokes' Hindu Law Books, p. 397.

[4. Mandlik, p. 220, 221. Mitakshara, Chap. II, S. 1, Cl. 2, Stokes' Hindu Law Books, p. 427,—ED.]

sacrifices to offer, and that his wife has no higher status than that of a concubine. Sloka 121 Acharakanda[1] imposes on a Sudra the duty of offering every day the five sacrifices, which all persons belonging to the twice-born classes have daily to perform. The Sloka runs in these terms[1]: 'He should be attached to his wife, 'should be pure (internally and externally), maintain those who de-'pend on him for support, and perform the Srâddha ceremonies. 'He should not neglect (the performance of) the five sacrifices mak-'ing use of the Mantra called *Namah.*' The word in Sanscrit which is translated as 'Sacrifices' is *Yajñâs*. The five sacrifices which a householder belonging to the twice-born classes must daily offer are mentioned in Sloka 102, which runs as follows[2] ;—"the great sacrifices to the *Bhutas*, the *Manes*, the *Gods*, the *Brahma*, and *Men* are (1) the Bali-karma (making of the Bali sacrifice), (2) the Svadha offering, (3) the offering of food to fire, (4) the repeating the Vedas and (5) the honoring of guests." Messrs. WEST and BUHLER seem to have been misled by the use of the word *Yajña*, and understood it to refer to the great sacrifices now understood by the word *Yâga*. But the word is not used in any such limited sense. In Sloka 102, the word used is *(Makha)* which means *Yâga*, and shows that all the three words merely mean sacrifices. The commentary of Vijñânesvara also, on Sloka 121 makes the thing perfectly clear. He further explains the words 'attached to his wife' to mean, that he shall have intercourse with his wife alone and not with prostitutes or other people's wives. How is this reconcileable with the idea that the relationship created was but one of concubinage. There is nothing in Yajnavalkya's Smriti or the commentary of Vijñânesvara to show that the form of marriage suitable to Sudras is the *Asura* *or some lower form[4]. The authorities cited for this statement are Gautama, Ch. XIX and Baudhayana, Ch. II, Sloka 2[5]. The references given are not correct. There is nothing [*71]

1. Mandlik's Yâjñawalkya, p. 177. Aparârka in introducing § 51 of Yâjñawalkya cites a text which shows that a Sudra must also have a patni.

2. *Ibid*, p. 174.

3. Digest of Hindu Law, p. 86.

[4. There is nothing on this subject in Chapter XIX of Gautama. Chapter X, § 50 to 65 (Sacred Books of the East, Vol. II, Gautama, pp. 233. 234) deals with the case of Sudras. § 55 states "(He, the Sudra, shall) live with his wife only." §65 states "some (declare) that he himself may offer the Pâkayajñas." The Pâkayajñas are stated in Gautama, Chapter VIII, § 18 to be of *seven* kinds. (See *Ibid* p. 217).—ED.]

5. [This reference also is not correct.—ED.]

in any portion of Gautama's book to countenance the statement, that marriage among Sudras is nothing but concubinage. The words in Baudhayana, which have been interpreted to convey this meaning, are to be found in page 207 of BUHLER's translation. They are as follows [1]: 'the fifth and eighth (are lawful) for 'Vaisyas and Sudras. For, Vaisyas and Sudras are not particular 'about their wives because they are allowed to subsist by such 'low occupations as husbandry and service. Some recommend 'the Ghândharva rite for all (castes) because it is based on '(mutual) affection.' The fifth and eighth forms of marriage referred to are the Gandharva and Paisacha forms. The former is described [2] as 'the union of a lover with a loving damsel' and the latter as follows [3]: 'if one has intercourse with (a maiden 'who is sleeping, intoxicated, or out of her senses (with fear or 'passion) and weds her afterwards, that is the rite of the Pisa-'chas.'—The statement made by the author himself, that some recommend the Ghandharva rite for all classes, because it is based on affection,[4] cannot be reconciled with the view that, in his opinion, it amounted to nothing but concubinage. It would be an unfair twisting of the meaning of the words 'are not particular about their wives'[5] to construe them as meaning that the marriage is but nominal. The words themselves simply mean, that among these two classes, sentiment does not play a prominent part in their picking and choosing a wife.[6] As they live by manual labour, it would naturally be so. They would be more callous to physical beauty and mental accomplishments. A strong hardy girl, who would bring forth healthy children, and assist them in their work in the field, would be the sort of help-mate they would seek, but it does not follow, that the tie, when once created, would be less binding, than among the other classes. Baudhayana includes Vaisyas among the twice-born classes.[7]

1. Baudhayana Prasna I, Adhyaya 11, Khandika 20, § 13 to 16. Sacred Books of the East Vol. XIV, p. 207.

2. Do.	Do.	Do.	Do.	§	6.	Ibid p. 206.
3. Do.	Do.	Do.	Do.	§	9.	Ibid p. 206.
4. Do.	Do.	Do.	Do.	§	16.	Ibid p. 207.
5. Do.	Do.	Do.	Do.	§	14.	Ibid p, 207.

6. [It may be curious to know the commentary of Govinda upon § 14. It is given in the footnote to the translation of Baudhayana in the Sacred Books of the East, Vol. xiv, at p. 207. "Those whose spouse is not restrained *i. e.*, not fixed by rule are called 'not particular about their wives.' The meaning is that there is oneness (dareshwaikyam) with respect to wives, that fixed rules regarding them are none." We have not got a copy of this commentary to see what the exact language used is.—ED.]

7. [This is only by inference.—ED.]

Marriage in the case of Vaisyas must then be performed, after uttering Vedic Mantras; and could he for a moment have thought that the tie so created was nothing but concubinage? The whole theory of Messrs. WEST and BUHLER is based on such slender foundation that it is a matter for regret, that it should have found a place in their book, which is recognized as a standard authority in the Bombay Presidency, and which is treated with great respect in the other *Presidencies also. From their remarks [*72] at pp. 375 and 376 it is evident, that they have included in the Sudra community all the wild tribes and the out-caste classes, such as Parias, Pallars, &c., in India. But they could not have forgotten that these classes are altogether outside the pale of Hindu society and Smritic law. The absurdities noted by the Bombay Court are the result of the strained construction it puts on Yâjñawalkya's Smriti and Vijñânesvara's commentary. In regard to the view taken by the Madras High Court, that the widow succeeds to the whole property of her husband, in preference to his illegitimate son,[1] the only reason assigned by it for this conclusion is that the relationship of the widow is based on a legal marriage. This reason would hold good in the case of the daughter, as well as the daughter's son, and yet, the illegitimate son is declared to be entitled to share the property with them. There is no absurdity, therefore, in supposing that the widow also is merely to share the property with the illegitimate son. We cannot, therefore, accept the *dictum* laid down by the Madras Judges as final, and we believe that they may see reason to change their opinion, when the question properly arises again for decision.

[Apart from the decision in the Jurist case already referred to, we think the Madras High Court has been consistently holding the view that the illegitmate son is entitled to a share along with the widow, daughter or daughter's son in the absence of legitimate issue. We are not here referring to the decision in *Krishnayyan* v. *Muthuswami*[2] which could be said to support the above view only as a matter of inference. But the case of *Ranoji* v. *Kandogi*[3] is express authority for this view. The learned judges there observed at p. 561: " We hesitate to accept the view that Vijnaneswara

1. *[Apparently reference is here made to the decision in *Kolandai Nachiar* v. *Ramamani, supra* p. 62.—ED.]

2. (1884) I. L. R. 2 M 407.

3. (1885) I. L. R. 8 M. 557.

intended to postpone the widow to the illegitimate son. He had already provided that the legitimate sons were to give shares to the widow and had recognized the right of the widow as superior to that of a daughter or daughter's son though doubtless in virtue of express texts........ Nilakant Bhatta appears to have understood that all heirs down to the daughter's son, who under the ordinary law, are recognized as entitled to inherit, would not be altogether superseded by an illegitimate son and the language of Devanna Bhatta is explicit." In this case, the learned judges refer to the Dattaka Chandrika as an authority for the view. Referring to the text of Yajnavalkya dealing with the rights of an illegitimate son (Yajnavalkya 2, verses 134 and 135) the author of the Chandrika observes[1] in S. 5, Cl. 31 : "If according to this authority, where there may be no son of the wife and the rest, but there may be a wife and daughters, the daughter's son be entitled to share (with the son by a female slave) ; the rule for the succession of daughter (or other proper heir) would be infringed ; therefore, if any even in the series of heirs down to the daughter's son exist, the son by a female slave does not take the whole estate ; but on the contrary shares equally with such heir."

The passage in *Parvati* v. *Thirumalai*[2] where this view is upheld has been already referred to. In *Chinnammal* v. *Varadarajulu*[3] the question directly arose for decision and the learned Judges in that case, after referring to the previous decisions held that the true principle of law was that the illegitimate son was a co-heir with the father's widow, daughter or daughter's son, and that the widow and the illegitimate son would be entitled to the property of the deceased in equal shares.

Even in Bombay it must now be taken that the decision in *Rahi* v. *Govind*[4] does not correctly represent the law upon that matter and that the widow is not excluded by the illegitimate son, but shares equally with him. The case of *Shesgiri* v. *Girewa*[5] has been already referred to in this connection. In *Ambabai* v. *Govind*[6] Mr. Justice *Ranade* observed at p. 265 : "It may be noted that even if the view that Bapuchand was a Sudra be accepted, it does not follow that his illegitimate sons would take the whole estate to the exclusion of the widow.

1. Stokes's Hindu Law Books 660.
2. (1887) I.L.R. 10 M. 334.
3. (1892) I.L.R. 15 M. 307.
4. (1875) I.L.R. 1 B. 97.
5. (1888) I.L.R. 14 B. 282.
6. (1898) I.L.R. 23 B. 287.

Illegitimate sons, of Sudras are no doubt, their heirs, taking with legitimate sons, daughters and daughter's sons only half the share of the legitimate son. The ruling in *Rahi* v. *Govind*, no doubt, laid it down that widows are absolutely excluded where there are only illegitimate sons as they would be in the case of legitimate sons. But the ruling, though supported by *West* and *Buhler*, has been strongly dissented from by the Madras High Court—*Parvati* v. *Thirumali*[1] and *Ranoji Kandoji*[2]—and Mr. *Mayne* also has spoken doubtfully on the point of its correctness. In *Shesgiri* v. *Girewa*,[3] *Sargent*, C.J., apparently thought that the widow would not be altogether excluded by illegitimate sons."

It must, however, be admitted that the question did not actually arise for decision in this case. Notwithstanding this, it must be taken that the trend of decisions is to the effect that the widow is a co-sharer along with the illegitimate son and that the mention of the daughter's son in Yâjñavalkya's text must be taken as illustrative of the series of heirs down to the daughter's son:—Ed.]

MITAKSHARA. * [72*]

Translator's Note.—Slokas 16 to 35, both inclusive, lay down the observances to be practised by Brahmachârins.

He (the author) fixes the period of religious studentship for the purpose of learning the Vedas.

36. For each Veda, (the period of) religious studentship is is either 12 years, or 5 years; some say, till completion of study. And the ceremony of Kesanta (केशान्त) or cutting off the hair is in the 16th year.

As it is said that before marriage, " a man has to study the three Vedas, or two, or one of them and then enter on the duties of a householder[4] " so, for each Veda, *i.e.*, for every one of the Vedas, the religious studentship above described should be observed for twelve years. In case of inability, five years. Some say, till completion of study.[5] But *Kesanta* is the ceremony called *Godâna*[6] (cutting off the hair). This should be performed for Brahmins in the 16th year from conception. And this is to be understood in case the devotion to* the Vedas is for a period of 12 years. In [*73] the other two alternatives, it must be understood to be when convenient. For Kshatriyas and Vaisyas, it must be understood to be in the 22nd, or 24th year, according to the time fixed

1. (1887) I.L.R. 10 M. 334. 2. (1885) I.L.R. 8 M. 557. 3. (1888) I.L.R. 14 B. 282. 4. Manu Ch. III § 2, Sacred Books, Vol. XXV, p. 75. 5. *i.e.* Till it is understood. 6. *See* Apastamba Grihya, Patala 6, S. 16, § 12 to 16. Sacred Books, Vol. xxx, pp. 284—5:—Ed.

for Upanayana. [In the other cases] it must be understood to be when convenient or suitable.

Now he (the author) mentions the highest limit for Upanayana.

37. The utmost limit of age for Upanayana for Brahmins, Kshatriyas and Vaisyas is respectively up to the 16th, 22nd and the 24th year.

38. Beyond that (if uninvested with thread) they fall, excluded from all rites and degraded from Savitri, and become Vratyas unless the Vratya-Stoma sacrifice is performed.

Up to the 16th year, *i. e.*, the whole of the 16th year, up to the 22nd, and up to the 24th year, for Brahmins, Kshatriyas and Vaisyas (respectively is), the highest Aupanâyanika time, *i.e.*, time relating to Upanayana. After that, there is no time for Upanayana. But after that period, (or beyond that) they fall excluded from all rites, *i. e.*, become incompetent for all rites. सावित्रि पतिताः (Sâvitri-patitâ), *i. e.*, (they) become fallen from Sâvitri, *i. e.*, become unfit to receive the gift of the Sâvitri. Vrâtyas, *i.e.*, destitute of purificatory ceremonies, in the absence of the Vrâtya-Stoma sacrifice.[1] If, however, that is performed, they become eligible for Upanayana.

The first three classes have been called dvijâs. He (the author) gives the reason.

39. As they are first born from their mothers, and the second birth arises from the tying of the maunji or string of sacred grass (round the waist), these, the Brahmins, Kshatriyas and Vaisyas, have been known as dvijas.

They are first born from the mother and the second birth (or regeneration) is by reason of the ligation or tying on of the munja grass girdle. Therefore, these, [the Brahmins, Kshatriyas and Vaisyas, are called *dvijâs.*

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[*Translator's Note.*—Slokas 40 to 50 both inclusive refer to the benefits arising from a study of the Vedas and of a life-long residence with the Guru and devotion to him.]

This ends the chapter on Brahmacharis.

III. THE CHAPTER ON MARRIAGE.

He (the author) mentions the bathing for marriage, of one who is marriageable.

51. Having carried to a termination the Veda or the observances, or both, and having given to the guru, or preceptor, the thing desired by him, he shall bathe by his permission.

[*74] In the aforesaid manner, Veda, *i. e.*, consisting of *Mantras* and *Brahmanas*. *Vratâs*, *i.e.*, observances (dharmâs) for Brahmacharins enumerated already. Either of these[2] ; or both (together).

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1. See Sacred Books, Vol. II, p. 272 and note to § 8 :—ED.
2. *i.e.*, either the Veda or the Vratas :—Ed.

Having carried to a termination[1], *i. e.*, having completed. Having according to his ability, given to the aforesaid Guru, the present, wished for (by the latter) he shall bathe. In case of inability, though he has given no present, by his permission. These alternatives have to be determined in reference to means, time, &c.

The author describes what he shall do after bathing.

52. He who has not fallen from the order of Brahmacharya shall marry a woman who is possessed of all good marks, (*i. e.* **qualities, mentioned in the sastras) who has not been owned by any other before, pleasing, an Asapinda, and is younger to him.**)

"He who has not fallen from the order of Brahmacharya" *i.e.*, he who has not deviated from the duty of chastity. "Marks": Possessed of good (qualities) *i. e.*, possessing good external and internal qualities. The external qualities are described by Manu[2] as fine hair, fine locks, fine teeth, &c. The internal qualities should be ascertained from Aswalayana's rule[3] beginning with "Having made eight balls." On the previous night, having taken earth from a cow-pen, an ant-hill, a gambling place, (the bed of) a deep pool, a saline (or barren) soil, a field, the crossing of four roads, and a burning ground, eight balls should be made. Of these, in due succession, if the first is touched (by the bride-elect), she will be rich in grain; if the second, she will be rich in cows; if the third, she will be zealous in tending (or the service of) the sacred fire; if the fourth, she will be wise, clever, and pre-eminent in acquiring friends; if the fifth, she will be diseased; if the sixth, she will be barren; if the seventh, she will be loose; and if the eighth, she will become a widow, according to the Smriti of Aswalayana.[4] "Woman," *i.e.*, one who has been examined as to womanhood (*i. e.*, ascertained to be so) for avoiding a hermaphrodite. "Who has not been owned by any other before," *i. e.*, who has never been appropriated to any other person either by gift, or by enjoyment. Pleasing, (कान्तां), agreeable *i. e.*, causing delight to the mind and eyes of the bridegroom. As Apasthamba has said

1. *i. e.*, he shall bathe after completing the Vedas or Vratâs or both :—Ed.

2. Manu, Ch. III., § 8 and 10. Sacred Books, Vol. XXV, p. 76.

3. Aswalayana, Adhyaya I, Khandika 5, § 4. Sacred Books, Vol. XXIX, p. 165. Aswalayana proposes in these two sutras a rough test of a woman's qualities and fortune, as it is difficult to find them out otherwise. Vijñânesvara professes to give the substance of Aswalayana's sutras but it differs greatly from what Aswalayana himself has laid down. [See also Parasara-Madhaviya translated in this volume :—Ed.]

4. Adhyaya I, Khandikâ 5, § 5. Sacred Books, Vol. XXIX, p. 165.

[*75] 'there is prosperity in her, by whom the mind[*] and eyes are captivated.' And this is in the absence of any external blemish, such as the excess or deficiency of any part of the body, &c.

"Asapinda"—she whose body is one and the same (with that of another) is said to be his *sapinda*. One who is not a *sapinda* is *asapinda*. Her [he shall marry].

Sapindaship arises by connection with parts of the same or one body. Thus, the sapindaship of the son with the father arises by connection with the parts of the father's body. Similarly (his sapindaship), with those beginning with the paternal grandfather, even by (reason of his) connection with parts of their bodies through his father. Similarly (sapindaship exists) with his mother by connection with parts of the mother's body. Thus, with those beginning with the maternal grandfather, through the mother. So, with the mother's sister, maternal uncle, &c., by connection with parts of the same body. So with the father's brother, father's sister, &c. So (that) of a wife with her husband, by the production of one or same body. So even between brother's wives by (their) respectively generating one body (in-connection) with those who have sprung from the same body. Thus wherever the word sapinda occurs, an immediate (direct) or mediate (indirect)[2] connection with parts (members) of the same body should be understood.[3] If this is the case, the rule that "ten days' impurity on account of death is prescribed for sapindas[4]" would equally (alike) extend to the maternal grandfather, &c. It will be so but for the special rules such as "In the case of those who have been given away in marriage others shall perform (the rites &c.)[5]." Hence among sapindas wherever there is no special rule[6] this rule about ten days obtains. And sapindaship should, necessarily, be described (as existing) by connection with parts

1. [Apasthamba Grihya Sutra, Prasna I, Patala I, Khanda (section) III, § 20. Sacred Books, Vol. XXX, pp. 257 and 258:—Ed.]

[2. The usual meaning of continuous succession or descent does not apply here:—Ed.]

[3. A translation of the passage as far as this is to be found in the P. C. case of *Lallubhai* v. *Cassibhai* (1880) I.L.R. 5 B. 110 (119.) See also W. & B. on H. L. Vol. I. p. 120, Sarvadhikary p. 601 and per *Mookerjee* J in *Sham Singh* v. *Kishun Sahai*, (1907) 6 C. L. J. 190 at pp. 199, 200:—Ed.]

[4. Manu Ch. V § 9. Sacred Book, Vol. XXV p. 178. Cf. also Vasishta Ch. IV § 16. Sacred Books Vol. XIV p. 28:—Ed.]

[5. Cf. Vasishta Ch. IV § 19. Sacred Books, Vol. XIV, p. 28:—Ed.]

6. Special passage of a code of laws.

(members) of the same body. Because of the saying in the Sruti beginning with "Self is born from (or begotten of) self"; likewise (of the saying) "You are born in your offspring[1]." And also because of the saying of Apastamba[2] such as "It is directly perceptible that very (person) has been reproduced as this (person, *i.e.*, son)." So in the Garbhopanishad[3] (it is said) "this body has six sheaths, three from the father and three from the mother. The bones, tendons and marrow from the father, and the skin, flesh and blood from the mother." As in the (aforesaid) different places connection with parts (of the body) is declared (sapindaship should be so described).

If sapindaship is by connection through the presentation of funeral cakes, there will be no sapindaship with the maternal line and with brother's sons, &c. If a (merely) conventional (or traditional) meaning is assigned (or given) by accepting the collective signification of the word (sapinda) the (etymological) meaning of the component parts (of the word) which is *assigned (recognized) [*76]
in different places will have to be abandoned. We shall declare hereafter how there may be no unwarrantable stretch of (the rule about) sapindaship by mediate (or indirect) connection with parts (members) of the same body.

"Younger" *i.e.*, one lower in age and size. "Shall marry" (उद्वहेत्) *i.e.*, (he) shall marry according to his own *Grihya* ritual.

He (the author) gives further particulars.

Who is free from disease, has a brother, and is not descended from the same Arsha and Gotra.

"Free from disease" (अरोगिणीं) *i.e.*, not afflicted with any incurable disease.[4] "Has a brother." (This is stated) in order to remove all doubts of the possibility of her being made a Putrika (or appointed daughter). From this it is to be inferred, that she becomes a Putrika even if she has not been so bespoken. "Not descended from the same *ârsha* and *gotra*." Relating to Rishi is named Ârsha; it means *Pravara*. *Gotra* is well-known as family

1. [Taittariya Brâhmana Ashtaka I, Prapâtaka 5, Anuvâka 5, Panchadi vi, Vakya 5. See the Vedic text repeated in Apastamba, Prasna II, Patala IX, Khanda 25, § 1. Sacred Books Vol. II p. 159:—ED.]

2. Apastamba, Prasna II., Patala 9, Khanda 24, Sutra 2. Sacred Books, Vol. II, p. 159.]

3. [The exact passage cannot be found. It cannot be traced even from Jacob's Index :—ED.]

4. [Free from chronic disease.—Aparарka :—ED.]

succession or lineage.[1] Ârsha with gotra forms आर्षगोत्रे (ârsha-gotré). He whose ârsha and gotra (*ârshagotré*) are the same is समानार्षगोत्रः (*samânârshagotrah.*) A woman descended from him is समानार्षगोत्रजा (samânârshagotrajâ). One who is not so descended is असमानार्षगोत्रजा (asamânârshagotrajâ). Her, (he shall marry). The mention of *gotra* and *pravara* indicates a prohibitive rule in respect of each. Therefore, the meaning is, (he shall marry) one who is not descended from the same *gotra* and who is not descended from the same *pravara*. So Gautama has declared[2] : " Marriage may be contracted between persons not of the same pravara." So also Manu has said[3] : " She who is not a sapinda of the mother, or a sapinda of the father." Thus, some desire to regard as ineligible for marriage, even a woman of the same *gotra* as the mother, since it is mentioned in the Prâyaschitta Smriti[4] that " a man having married the daughter of his maternal uncle, or a person of the same *gotra* as his mother, or a person of the same *pravara* (as himself), shall abandon[5] her and observe the *Chândrayana* vow."

Here by the word *asapinda*, the prohibition of the daughters of the father's sister, mother's sister, &c., is to be understood. Similarly by the word *asagotra*, a woman (girl) who although not a *sapinda* and born in a different line, is yet of the same *gotra*, is excluded. By the word *Asamânapravara* (a female not of the same
[*77] *pravara*) a female *who although* neither a *sapinda*,* nor a *sagotra*, is yet of the same *pravara*, is excluded. Hence, what is stated here about *asapinda* (one who is not a sapinda) applies to all castes, as sapindaship exists among all (castes). What is stated here as to *asamânârshagotraja* (a female not descended from the same

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1. The word *gotra* refers to lines of descent, of which there are ordinarily supposed to be 24, traceable to eight great primeval Rishis. The word *pravara* means leader or a rishi who contributes to the credit of a particular gotra. In each gotra or line there may be several such rishis or leaders. The prohibition of an identical pravara narrows the class of eligible persons already narrowed by the rule regarding gotra. [As to the discussion upon this term see Muller's Ancient Sanskrit Literature, pp. 379 to 390. See also Sacred Books, Vol. II, p. 126 (note) :—ED.]

2. Gautama, Ch. IV., Sutra 2. Sacred Books, Vol. II, p. 194.

3. Manu, Ch. III, § 5. Sacred Books, Vol. XXV, p. 75. [The text is " Asagotra " in Apararka:—ED.]

[4. Ascribed to Sâtâtapa in the Vaidyanâtha Dikshatiyam. Cf. Manu XI, S. 172. Sacred Books, Vol. XXV, p. 466 :—ED.]

[5. Another reading is गत्वा instead of त्यक्त्वा, so that the text will read he *shall go*, instead of (*he*) *shall abandon her* :—ED.]

ârsha and gotra, applies only to the first three castes. Though Kshatriyas and Vaisyas have not their own peculiar gotras and, consequently, no *pravaras*, their *gotra* and *pravara* must be understood to be those of their purohits. So having said, "he recites (lit. selects) the pravara of the sacrificer," Aswalayana says[1] "For Kshatriyas and Vaisyas he recites (lit. selects) those (the gotra and pravara) belonging to the purohits." Wifeship itself is not created in those(females) who are *sapindas*, or belong to the same *gotra* or *pravara*. Even though wifeship is created in diseased women, &c., it is an obvious contradiction (or inconsistency.)

In construing the word asapinda, sapindaship has been said to arise through an immediate or mediate connection with parts (members) of the same body. As society has no beginning, this (sapindaship) may exist somehow everywhere and between all persons, and thus there will be an unwarrantable stretch (of the principle about sapindaship.) He (the author) therefore says [2]:

53. One who is likewise removed more than five degrees from the mother, and more than seven degrees from the father.

From the mother (मातृत:) *i. e.*, in the mother's line beyond the fifth. From the father (पितृत:) *i.e.*, in the father's line beyond the seventh: "the sapinda relationship ceases" must be understood. Hence the word 'sapinda' though by force of its component parts applies everywhere, is restricted in application, like the words Nirmanthya,[3] Pankaja,[4] &c. So the six ancestors beginning with the father, and the six descendants beginning with the son, are sapindas, and oneself is the seventh. Even if there is a divergence of line, the seventh (in degree) is to be calculated by commencing from him (the person) from whom there is a divergence of line and this (rule) should be applied in all cases.[2] So, the female who occupies the (line of the) fifth generation in the counting, beginning with the mother,[5] of the mother's

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1. Aswalayana Grihya Sutra.

[2. See per *Mookerjee* J in *Sham Singh* v. *Kishun Sahai* (1907) 6 C.L.J. 190 at p. 200—ED.]

3. Wood used for producing fire by friction.—*Literally* that which is rubbed or stirred.

4. The Lotus.—*Literally*, that which grows in the mire.

[5. This seems to be the basis of the view that the calculation of degrees in Hindu Law is according to the Canon and not the Civil Law. See for more upon this subject the translation of the corresponding portion of the Madhaviya in this volume—ED.]

father, grandfather, &c., is considered or deemed to be the fifth from the mother. Similarly she who occupies the line of the seventh generation in the counting, beginning with the father[1], of his (the father's) father, &c., (is considered) the seventh from the father. So also, in the matter of marriage divergence of line is considered
[*78] to arise, by reason of two sisters, a *brother and a sister, or a brother's daughter (niece) and a paternal uncle forming two separate stocks of descent (of the persons proposed to be married).

What is said by Vasishta[2] "fifth from the mother and seventh from the father," and what is said by Paitinasi "Beyond three removes from the mother and five removes from the father," must be intended to prohibit nearer degrees and not to recommend those degrees (*i. e.*, the degrees further than those expressly stated). Thus there is no conflict between the various Smritis. This (rule) moreover is observed among persons of the same caste. There is, however, a difference in the case of those of different castes. As Sankha says: "If there are many who are born to one and who are of different Kshettra (*i. e.*, born of different wives or mothers) or of different janâh (individuals), they are of one *pinda*, but different in regard to impurity. The *pinda* (*i. e.*, sapindaship), however, extends to three." **एकजाताः** (*Ekajathah*) *i. e.*, born to one, as a Brahmin, &c.; **पृथक्क्षेत्राः** (*Prithak Kshetrâh*) *i. e.*, born of women belonging to different castes; **पृथक्जना :** (of different individuals), *i. e.*, born of different women of the same caste. They are of one *pinda*, *i. e.*, sapindas, but different in regard to impurity The difference relating to impurity, we shall point out in the chapter on Impurity.[3] "The *pinda*, however, extends to three." *i. e.*, sapinda relationship extends only to three generations.

54. He shall choose from a great family of Srotriyas celebrated for ten generations.

Pûrushâh is the same as *purushâh.* **दशभिः पूरुषैः** (*Dasabhih-pûrushaihi*, or. ten generations) *i. e.*, Five generations from the mother and five from the father. From a family which is renowned (for such generations, he shall choose.) *Srotriyânam* (of Srotriyâs), *i. e.*, of those who have studied the Vedas. Study of the Vedas is only used in a generic sense (or as a comprehensive designation).

[1. See page 77 Note (5) :—ED.]

2. Ch. VIII, § 2, Sacred Books, Vol. XIV, p. 42. [The translation there given is "Who is not related within 4 degrees on the mother's side nor within 6 degrees on the father's side :—ED.]

[3. See Mitakshara commenting upon § 22 of the Prayaschitta Adhyaya Chapter on Impurity) and citing texts of Harita and Vishnu :—ED.]

Of those who are well read in the study of the Vedas and the Sastra. महाकुलं (Mahâkulam) *i. e.*, a great family, *i. e.*, which is rich in children and grandchildren, kine, female slaves, lands[1] and other things. It is prescribed that a girl should be taken from that family.

He (the author) notices an exception even to a match suitable in all other respects.

54. But not from a family tainted with any transmissible diseases even though prosperous.

"Transmissible diseases," *i.e.*, leprosy, epilepsy, &c., "Doshâh" *i.e.*, taints which are communicated through semen and blood. In addition, feebleness, impotency, &c., are mentioned by Manu.[2] "From a family, even though prosperous," *i. e.*, though great as described above, if it is subject to these defects (taints) a girl ought not to be taken.

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*CRITICAL NOTES. [*79]

The Court of Wards *v.* Sri Gowrachandra :—1 M.L.J. 30.—In this case, the Madras High Court consisting of *Muthusami Aiyar* and *Best*, JJ., decided that when a Zemindar, whose estate was under the Court of Wards by reason of his incapacity to manage his affairs, he being otherwise competent to contract, relinquished his interest in the Zamindary in favour of his eldest son, subject to a provision for a monthly maintenance for himself, the alienation would be valid if made with the consent of the Court of Wards. Their Lordships held that S. 5 of Reg. V of 1804 prohibits an alienation of property by the incapacitated person without the sanction of the Court of Wards (see *Balkrishna* v. *Masuma Bibi*.[3]) S. 7 of Act IV of 1882, read with S. 11 of the Contract Act, renders the incapacitated owner under the Court of Wards incompetent to transfer property. But their Lordships say that the Court of Wards, which stood in the position of guardian to the Zemindar, could validate the transfer by their sanction. The reasoning appears to be that the defect in the capacity to transfer, occasioned solely by the subjection to the Court

[1. The Sanskrit word is ग्राम and here it means an inhabited (and unfortified) place in the midst of fields and meadow land, where men of the servile class mostly reside and where agriculture thrives.—ED.]

[2. Chapter III § 7. Sacred Books, Vol. XXV, p. 76.—ED.]

3. (1882) L. R. 9 I A. 182 : S. C. I. L. R. 5 A. 142.

of Wards, could be cured by their consent. The position that the Court of Wards are the guardians of the incapacitated person seems open to question.[1] Then what is the legal status analogous to that of a guardian, which empowers them to sanction the alienation? Again, under what circumstances is the consent or alienation proper? It is not clear that the Court of Wards as guardians could themselves make this alienation, for they would be exceeding their powers in depriving the ward of his property.[2] The ward by his incapacity (*vide* S. 5 of Reg. V of 1804) cannot transfer property.[3] But it is said that the sanction was beneficial to the ward and within the power of a prudent guardian to give. How could the sanction validate a transfer which as guardians they could not make? Is it prudent and beneficial in the eye of the

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1. [Ss. 15 and 20 of the Madras Court of Wards Act (I of 1902) refer to the court's assumption of superintendence of the person and property of the ward. —Ed.].

2. [Compare *Latchmeswar Singh* v. *Chairman of the Darbhanga Municipality* (1890) I. L. R. 18 C. 99 : s. c. L. R. 17. I. A. p. 90. *Prima facie* a guardian has no power to make a gift of the ward's property or to relinquish the ward's right unless the relinquishment is in compromise of litigation when such compromise will be valid and binding on the ward if it is made *bona fide* and for the ward's benefit. S. 35 of the Madras Court of Wards Act only empowers the court to mortgage or sell or give leases of the ward's property. The general provision in the same section that the court may do such acts as it may judge to be for the advantage of the ward or for the benefit of the property cannot be taken as conferring a power to relinquish the whole property of the ward. See *Latchmeswar Singh* v. *Chairman of the Dharbhanga Municipality* (1890) I. L. R. 18 C. 99 : s. c. L. R. 17 I. A. 90 and *Rajah Mohammad* v. *Mumtaz Ali Khan* (1901). I.L.R. 23 A 394 : s. c. L.R. 28 I. A. 193 (196). In this last case it was held that as a guardian under the general law had no power to relinquish the property of his ward for no consideration, the Court of Wards had equally no such power, and that the provisions of the Court of Wards Act did not confer such power. These provisions are substantially similar. Cf. *Thakore Fatesingji* v. *Bamanji* (1903) I.L.R. 27 B 515 at p. 527 (Per *Batty* J.) :—Ed.]

3. [The position of a proprietor disqualified upon his application on the ground of his indebtedness and consequent inability or on the ground of his unfitness for managing his estate but is otherwise not disqualified was considered by the Privy Council in *Dhanipal Das* v. *Maheshar Bakksh Singh* (1906) I. L. R. 28 A 570 : s. c. L. R. 33 I. A. 118 where it was held that the Oudh Land Revenue Act governing the subject did not disqualify the proprieter to bind himself by contracts but only to charge the property and that therefore the contracts of such a proprietor were not void and could be enforced by attaching his estate after the Court of Wards had withdrawn their management. But the Madras Court of Wards Act, by S. 35 of Madras Act I of 1902, imposes a disability also on the disqualified owner's powers of contracting. The restriction is not confined to charging property.—Ed.]

law, having regard to the ordinary bent of human nature to own and possess property? Supposing the Zamindar was a minor, or a lunatic, could the Court of Wards alienate all the property in the same way? There are Hindus, for example, who will divest themselves of all their property for the benefit of a temple, and the act is highly meritorious. Can the guardian do likewise on behalf of the ward? Would it be prudent, and beneficial to the Zamindar, to deprive him of his property and his dignity as a Zamindar, because some Zamindars might have the sentimental satisfaction of seeing their sons installed in their stead? If the Court of Wards were acting as the agents of the ward, they might do whatever their principal could do. But they act, it is said, as his guardians. Helping the ward to get rid of his property for the supposed dignity of the estate is not, we conceive, the act of a *prudent* manager.

Bullam Dos v. Amar Raj.—I. L. R. 12 A. 537.—A person that held two mortgages on the same property, and obtained decrees thereon, sold the property in execution of one, and purchased it himself. The surplus sale proceeds which were paid into court were taken away by money decree-holders against the mortgagor. The court held on the authority of two* cases reported in the Weekly Notes [1] and the case of *Bapu Raoji* v. *Ramji* [2] that the other mortgage-decree could not be executed against the judgment-debtor. It does not appear from the report whether the sale was in execution of the decree on the first or the second mortgage. We are not referred to any principle in support of the decision. Ordinarily, if the two mortgages were held by different persons, a sale of the property at the instance of the first mortgagee would pass it free of encumbrances to the purchaser, and the second mortgagee, though deprived of his security, would be free to pursue his other remedies against the mortgagor. [It does not appear clear why the mortgagee in this case could not pursue his other remedies, and in fact the application before the court in the case under notice was to attach the other properties of the mortgagor.—ED.] If, however, the sale of the property was at the instance of the second mortgagee the mortgagor's equity of redemption after deducting the interest of the first mortgagee would alone pass to the purchaser, and the remedies of the first mortgagee would be left

1. *Ahmad Wali* v. *Bakar Hussain* (1883) A. W. N. 61. *Khwajah Bakksh* v. *Imaman* (1885) A. W. N. 210.
2. (1886) I.L.R. 11 B. 1 (112).

unimpaired. And if the surplus sale proceeds are taken by the creditors of the mortgagor, in either case, the second or the first mortgagee, as the case may be, will not lose his remedies against the mortgagor, although he may have a right to relief against the creditors (S. 295, C.P.C.) But when both mortgages are held by the same persons why should the sale of the property on foot of one and the appropriation of the surplus sale proceeds by money creditors, extinguish the liability of the mortgagor for the other? Because, it may be said, the mortgagee puts the property to sale free of *all* claims on his part, and he cannot harass the debtors again, except for the balance of his claim, if any, after crediting the entire sale proceeds. But this reasoning cannot avail, when the mortgagee gives express notice of the interest he sells, unless the law compels him to sell the property free of all encumbrances on his part. [It must be taken to be now settled law that the mortgagee should sell the property free of all incumbrances on his part although it does not appear clear what he should do when one of the mortgages has not become due—see *Dorasami* v. *Venkataseshayyar* [1] and *Keshavram* v. *Ranchhod.* [2] So also we must say that the reasoning cannot avail when there is no surplus left after dischargeof the first mortgage or the surplus is not made available by reason of its being takenover by others by order of court :—ED.]

It has no doubt been held by the Bombay High Court in *Bapu Raoji* v. *Ramji* [3] that the holder of two mortgages on the same property cannot foreclose for one, reserving all remedies on the other. Either the foreclosure will be re-opened, or the other mortgage is extinguished. The principle of this decision evidently appears to be that the property having been held sufficient security for both mortgages, the foreclosure proceeding, which might deprive the mortgagor of a large property for a small debt, should be relieved against. In the case of foreclosure, the value of the property is unknown, and it having stood security for two debts, the Court might well say " there shall not be foreclosure unless for the whole claim." That is the measure of the relief awarded by Courts of Equity against foreclosure. The Bombay decision follows the rule laid down at Vol. II. p. 682, of Spence's Equitable Jurisdiction. When there is a covenant and a collateral security, you cannot foreclose the security, and pleading insufficiency of the property, proceed

1. (1901) I. L. R. 25 M. 108. 2. (1905) 7 Bom. L. R. 811 : S. C. I.L.R. 30 B. 157.
3. (1886) I. L. R. 11 B. 112.

upon the covenant for the balance due. See *Perry* v. *Barker*[1] and *Lockart* v. *Hardy*.[2] This rule based upon considerations of equity is thus stated by Coote (5th Edn.) p. 1107. "So anxious is equity to afford every reasonable relief to the mortgagor, that even after a decree of foreclosure has been signed and enrolled, and the mortgagee has been in possession for many years, nevertheless the Court will, under special circumstances, *re-open the decree. Moreover, in India, before S. 99 of the Transfer [*81] of Property Act was enacted, it was held that when a mortgagee obtained a money decree for the mortgage amount, and sold the mortgaged property, the mortgage interest could not subsist, but the purchaser took the property free of the charge. (See *Syud Emam Momtazoodeen Mahomed* v. *Rajcoomar Dass*[3]; *Bhuggobutty Dossee* v. *Shama Churn Bose*[4]; *Rama Naickan* v. *Subraya Mudali*[5]; and *Narsidas Jitram* v. *Joglekar*[6]). The principle of these cases was extended by the Bombay High Court in *Bapu Ravji* v. *Ramji*[7] where they held that a foreclosure decree could be re-opened not merely as stated by Fisher when "he the mortgagee sues the mortgagor upon his covenant" (p. 958, Fisher on Mortgage, 4th Edn.) but also when he proceeds to enforce a second mortgage on the same property. The reason of the rule is the same "that until the estate be sold, you cannot tell its value," and the foreclosure of the estate must be taken to cover the whole amount due, whether part of it was claimed as the excess of the mortgage amount over the value of the property, or as a further advance, or as the amount of a second mortgage. But in the case under notice, the Allahabad High Court apply the rule as to the extinction of the second mortgage to the case of sale. The mortgagee selling the property cannot re-open the sale, as he can do the foreclosure. The extinction of the liability of the mortgagor for the second mortgage in a case of foreclosure, cannot extend to the case of sale, as the value of the property is known. The Allahabad Judges themselves do not say that the mortgagee may not proceed against the mortgagor, if the surplus sale proceeds are insufficient for the excess due after giving credit for the whole sale proceeds. And it will be open to the mortgagee still to proceed against the creditors who have taken the surplus (S. 295, C. P. C.). But they do say that he cannot

1. (1803) 8. Ves. 351.
2. (1846) 9 Beav. 349.
3. (1875) 14 B. L. R. 408.
4. (1876) I. L. R. 1 C. 337.
5. (1873) 7 M. H. C. 229.
6. (1879) I. L. R. 4 B. 57.
7. (1886) I. L. R. 11 B. 112.

proceed against the mortgagor on the unsatisfied mortgage. The fact that there is a charge upon the surplus in favour of the mortgagee, does not, *ipso facto*, extinguish the mortgagor's liability on his covenant. The Bombay decision based on the peculiarity of a foreclosure decree does not seem to support the Allahabad case. The only principle on which it may be rested is that a mortgagee selling the mortgaged property, sells it necessarily free of all claims on his part, whether he sells it for an independent money decree, or mortgage decree, and whether all his claims have matured or not at the time of sale. But we have not seen this principle so broadly stated anywhere.

[This case so far as it purported to follow the principle laid down in *Ahmad Wali* v. *Bakar Hussain*[1] seems to rest on a doubtful basis. The principle laid down in this latter case was that where a mortgagee purchased a portion of the mortgaged property the whole mortgage became extinguished. This principle is hardly tenable and has been rightly overruled by a Full Bench of the Allahabad High Court in a later case. See *Nand Kishore* v. *Raja Hari.*[2] Mr. Justice *Banerji* in this case apparently treats the case of *Ballam Das* v. *Amar Raj*[3] as proceeding upon a wrong principle[4] and it is treated as of doubtful authority in *Sesha Ayyar* v. *Krishna Ayyangar*[5]. Cf. *Munshi* v. *Daulat*[6]. The principle laid down in the case of *Dorasami* v. *Venkataseshayyar*[7] is that a mortgagee having two mortgages over the same property is not entitled to maintain a suit for sale on one of the mortgagees subject to his other mortgage, but even this principle does not help the conclusion in the case under notice:—Ed.]

Ragavayya *v.* **Subbayya.**—I. L. R. 13 M. 475.—**Mackenzie** *v.* **Striramiah.**—I. L. R. 13 M. 472 :—These two cases are of considerable importance, and may affect a large number of people who have taken licenses for the cultivation of salt and entered into contracts for long terms with merchants who could command capital, with reference to the salt cultivated by them. Each is a decision of a single Judge, and the learned Judges

1. (1883) A. W. N. 61.
2. (1897) I. L. R. 20 A. 23.
3. (1893) I. L. R. 12 A. 537.
4. I. L. R. 20 A. at p. 34.
5. (1900) I. L. R. 4 M. 96 (112).
6. (1906) I. L. R. 29 M. 262.
7. (1901) I. L. R. 25 M. 108. [But if a decree is made, though wrongly, he may, according to the Allahabad Court, bring a suit upon the other mortgage. See *Murlidhar* v. *Sher Singh* (1906) 3 A. L. J. 228. See also *Raghunath* v. *Jamna Prasad* (1906) I. L. R. 29 A. 233 :—Ed.]

who decided them do not seem apparently to take the same view of S. 27 of the Contract Act. In the earlier case of *Ragavayya* v. *Subbayya*, *Muthusami Aiyar*, J., held that a contract by a licensee to sell all the salt manufactured by him to the plaintiff in the case was void under S. 27 of the Contract Act as it "restrained the sale to others than the *plaintiff" and as contracts in partial restraint of [*82] trade are forbidden in this country, equally with agreements in total restraint of trade. In the other case, *Mackenzie* v. *Striramiah*, Mr. Justice *Handley*, sitting on the original side, decided that a similar agreement did not restrain the person making it from exercising his trade and was binding on him. His Lordship treated Mr. Justice *Muthusami Aiyar's* judgment in the previous case as laying down merely that there is no distinction in this country between partial and total restraint of trade and he declined to accept it as authority for holding that the agreement in question in the case before him was void, on the ground that a copy of the agreement was not before him. The terms of the agreement, however, to which the decisions had reference were precisely similar. Mr Justice *Handley* observed: "I understand the section to aim at contracts, by which a person precludes himself altogether either for a limited time or over a limited area from exercising his profession, trade, or business; not contracts by which, in the exercise of his profession, trade, or business, he enters into ordinary agreements with persons dealing with him, which are really necessary for the carrying on of his business." The decision of Mr. Justice *Handley* would probably commend itself more to professional minds than the earlier decision in *Ragavayya's case*[1]. The latter is not in accordance with the case of *Carlisles, Nephews Co.* v. *Ricknauth Buktearmull*[2]. In that case an agreement by which the plaintiff agreed to sell all goods of a certain description made by him up to a certain time to defendant and not to sell any goods of the kind to any one else, was held not to infringe the provisions of S. 27. The case was apparently not cited in *Ragavayya* v. *Subbiah.*[1] The illustrations to S. 87 of the Act (the sale of all the indigo which might be produced at a factory during the year, all the crops that may be grown on certain land during a certain period) support the same view. A man can hardly be said to restrain himself from carrying on his trade by agreeing to sell all the salt he makes to a particular person. He is at liberty to make as much salt as he pleases, and there is no

1. (1889) I. L. R. 13 M. 475.
2. (1882) I. L. R. 8 C. 809 (812, 813)

restraint whatever on production. Such an agreement does not seem to come within the object of the Statute, which was chiefly the protection of the public against the mischievous consequences of agreements, whereby people restrain themselves from exercising their talents or pursuing their calling. It may be otherwise if the person in whose favour the agreement is made is not bound to buy all the goods made by the promisor. In that case, the latter is really restrained from exercising his calling of making salt, and the agreement would be void. But a mere agreement to sell the goods made to a particular person would appear to be no more a restraint of trade than any other contract for sale.

[The language of S. 27 of the Contract Act is not happy enough, but it seems to be now considered that a transaction whereby a person is engaged in the exercise of his trade to a particular person within a particular period is not obnoxious under that section although it may be implied from it that during that period he cannot be engaged on his own account. See *Haribai* v. *Sharaf Ali*[1] and *Charlesworth* v. *Macdonald*.[2] In *Sadagopa* v. *Mackenzie*[3] the Court considered that an agreement by *A* to sell all salt manufactured by him to *B* and not to others would be valid and enforceable though a further covenant to manufacture no more salt than was required by *B* would be void. A contract by which *A* agrees to sell goods to *B* at a certain rate if the latter sends them to a certain place and at a higher rate if to another place is not a contract in restraint of trade.[4] An agreement to limit competition and keep up prices has been held to be not necessarily a restraint of trade.[5]—ED.]

Kearley *v.* **Thomson.**—24 Q. B. D. 742 :—The question has not often arisen in this country for decision whether when two persons enter into an illegal contract, one of them can get restoration from the other of any property delivered, or any money paid, under the contract, before the illegal object has been accomplished.
[*83] S. 65 of the *Contract Act deals with the question of restitution. It is in the following terms : " When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from

1. (1897) I. L. R. 22 B. 861 per [*Candy* J.]. 2. (1898) I. L. R. 23 B 103 (112).
3. (1891) I. L. R. 15 M. 4. *Prem Sook* v. *Dhurum Chund* (1890) I. L. R. 17 C. 320.
5. (1904) I. L. R. 29 B. 107.

whom he received it." The latter part of the section deals with contracts, which become void, after they were entered into, and we are not now concerned with them. From the language of the former part it would appear that provision is made for restitution only when an agreement, *not known to be void, when it was made, is afterwards discovered to be void*, and the illustration (*a*) when *A* pays *B* 1,000 rupees in consideration of *B*'s marrying *C*, and *C* is dead at the time of the agreement, B must pay back the 1,000 rupees to *A*, shows that it is intended to apply to cases where, owing to some mistake of fact on the part of the parties, they enter into an agreement, which is incapable of performance, illegal, or void for any other reason.[1] It follows, therefore, that when an agreement is void for illegality or otherwise, and both the parties were aware of all the facts, when it was entered into, there is no provision made for the recovery of any money paid, or any property delivered by one of the parties to the other. *Dayabhai Tribhovandas* v. *Lakhmichand Panachand.*[2] In English law the rule as thus widely stated was supposed to have several exceptions. But the decision of the case under notice has thrown doubt on the existence of such exceptions. In this case while a petition to adjudicate the plaintiff an insolvent was pending, he entered into an agreement with the defendant, a creditor, that the latter should not appear at the public examination of the insolvent, and at the motion for discharge, and in consideration therefor, the plaintiff agreed to pay the defendant £40. In pursuance of the agreement the plaintiff paid the defendant £40. The defendant did not appear at the public examination. The plaintiff sued the defendant for the refund of the £40, and contended that the contract was illegal and void, and as the illegal contract had not been carried out, he was entitled to get it back; and relied on *Taylor* v. *Bowers.*[3] The defendants contended, *inter alia*, that the plaintiff having been a party to the illegal contract could not recover the money paid under it on the ground that the illegal purpose had not been carried out, and that in this case, the contract really had been performed in part, as the defendant in consequence of it did not appear at the public examination of the insolvent. *Fry*, L. J., who delivered the judgment of the Court strongly doubted the correctness of the

1. Cf. *Radha Krishna* v. *The Municipal Board of Benares* (1905) I. L. R. 27 A. 592 at p. 601.
2. (1885) I. L. R. 9 B. 358.
3. (1876) 1 Q. B. D. 291.

proposition laid down in *Taylor* v. *Bowers*,[1] that before the illegal purpose is carried out a party to an illegal contract may claim restitution of any payment he may have made, and his Lordship adverted to the circumstance, that there was no earlier case than *Taylor* v. *Bowers*[1] in which such a principle was laid down. The court held also that the contract had been performed with regard to a substantial portion of it. It is doubtful whether his Lordship was quite correct in the statement he made with regard to the state of the authorities previous to *Taylor* v. *Bowers*.[1] See *Hastelow* v. *Jackson*[2] referred to by *Cockburn*, C. J., in *Taylor* v. *Bowers*. But the *tendency of later* [*84] **decisions appears certainly to be against recognizing exceptions* to the rule that the court will not help persons to recover money paid under an illegal contract. *Taylor* v. *Bowers*[2] was doubted in *Herman* v. *Jeuchner*.[4] There a defendant in a criminal case, who had been ordered to find bail for good behaviour for two years, deposited a certain sum of money with a certain person, who agreed to be surety, and to return the money after the two years, in case the defendant in the criminal case did not by his conduct cause the surety to forfeit the bail. The defendant in the criminal case sued the surety for the return of the deposit and was met by the plea, that the contract being illegal, he could not recover. The plaintiff contended that the rule did not apply as nothing had been done in pursuance of the contract. The Court of Appeal held that the defendant's consenting to stand surety was performance of the illegal agreement, and plaintiff could not therefore succeed. But *Brett*, L. J., went further and observed: " For the defendant it may be observed that the illegal object itself would be sufficient to prevent the plaintiff from recovering." *Baggallay*, L. J., however, did not agree to this proposition. He observed that he was far from expressing his dissent as to the view of *Stephen* J., in *Wilson* v. *Strugnell*[3] that when the illegal purpose has not been effected, the money deposited may be recovered back. The whole question will have to be reconsidered when the question is taken up to the House of Lords. The exception is supported on the ground that when the illegal purpose has not been carried out, a person who sues to recover money paid or property delivered under the agreement has not got to rely on

1. (1828) 8 B. & C. 221.
2. (1885) 15 Q. B. D. 561.
3. (1881) 7 Q. B. D. 548.

the illegal agreement. His case would be merely that the defendant has no right to the money or the property. The defendant then has to plead the agreement. The plaintiff's reply will then be that the agreement is illegal. The argument cannot be considered to be quite satisfactory. The plaintiff cannot be said to have shown a cause of action against the defendant by asserting that the defendant has no right to the money or the property. The general rule is that money or property voluntarily paid or delivered cannot be recovered, and the plaintiff, to show a title to recover, will have to allege that the agreement under which payment or delivery was made is illegal. He cannot then succeed without relying on the illegal agreement. It is very doubtful whether, under the section of the Contract Act, the exception can be supported. The language does not seem to permit it. There is another exception to the rule under the English law, that when the parties are not *in pari delicto* but one of them is more guilty than the other, (as where there is the relation of the oppressor and the oppressed, &c.) the less guilty party may recover against the more guilty. Under the Indian Act, it may be held that if one of the parties is ignorant of some fact, of which the other is aware, and in consequence enters into a contract, which he afterwards discovers to be void, he may claim restitution. *But if both are aware of the illegality*, the section does not seem to permit a comparison of the guilt of the parties, to allow restitution on the ground that one of the parties is less guilty than the other. The exception, however, receives some support from the observations of the Judges in **Dayabhai Tribhovan Das* v. *Lakhmichand.*[1] The exceptions of [*85] the English Law are hardly calculated to maintain a high standard of contractual authority and the Indian Legislature probably did not think it right to introduce them into this country. It is satisfactory to note that the English courts seem to be tending towards the same view.

[All the authorities upon this subject, English, American and Indian, have been ably reviewed by Mr. *Justice Mookerjee* in *Jadu Nath* v. *Rup Lal.*[2] *Muthuraman Chetty* v. *Krishna Pillai* [3] contains the latest pronouncement upon the subject in Madras.—Ed.]

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1. (1885) I. L. R. 9 B. 358.
2. (1906) I. L. R. 33 C. 967.
3. (1905) I. L. R. 29 M. 72.

[*127] ## * SUMMARY OF ENGLISH CASES.

In re **Sharp Rickett** v. **Sharp**. [L. R. 45 Ch. D. 286.]

Investment of trust funds—Public Company—" Ejusdem generis."

A testator, by his will, directed the investment of his estate " upon securities of any railway or other public Company." It was held by the Court of Appeal that the public Companies referred to need not be merely such as are incorporated by special Acts or by Royal Charter, because of the reference in the same clause to Railway Companies which are so incorporated. The Court also held, that when certain Companies were incorporated under a public statute, the public knew the rules regulating them, and their shares were transferable, they were public Companies.

In re **Rawlin's Trusts.** [L. R. 45 Ch. D. 299.]

Life estate, gift over—Death without leaving children—Implied gift to children.

Held, that where there is a life interest given to a person, and then a gift over if that person dies without leaving children, the gift over alone will not give the children any interest whatever. Further, the fact that there is a residuary gift which deals [*128] with* the property in question, in a way somewhat different from that in which the testator deals with it in the event of the donee of the life interest leaving no children, is not sufficient to imply a gift to the children.

[*Kinselia* v. *Caffrey* [1] approved of.]

In re **Heads' Trustees and MacDonald.**

[L. R. 45 Ch. D. 310.]

Agreement to sell—Defect of title—Substitution of new title.

A testator devised real estate to trustees, upon trust, to pay the rents to his widow for life and after her death, to sell and convert and divide the proceeds among his children. The trustees who had no power to sell it during the life of the widow, entered into a contract for sale to be completed by a certain time. When the defect was discovered, the trustees contended that the trust for sale could be accelerated by the widow's surrendering her life-estate. Before the time fixed for completion, the purchaser

1. 11, 11 L. Ch. R. 154 at 162.

repudiated the contract on the ground that a good title could not be made. After the time fixed, the vendors offered to procure the beneficiaries (the children) to join in the conveyance. It was held by the Court of Appeal, that the purchaser could not be compelled to complete the contract, the concurrence of the beneficiaries not having been offered till after the expiry of the time for completion and after the repudiation by the purchaser. *Quaere.*—As to whether, having regard to the fact that a different title was now offered, the purchaser could be forced to complete the contract, if the concurrence of the beneficiaries had been offered, and an opportunity for investigating their title given, before repudiation.

Henderson *v.* Bank of Australasia.

[L. R. 45 Ch. D. 339.]

Company—General meeting—Amendment to resolution—Waiver by conduct.

At an extraordinary meeting of a Company an amendment was moved by a member, to a resolution, notice of which had been given, but the chairman declined to put the amendment although he understood it. On an action by the member to set aside the resolution: *Held* by the Court of Appeal, that the chairman was wrong in refusing to put it to the meeting; that as the chairman had deliberately ruled that no amendment could be moved, it was not necessary for the member to contest the ruling, or leave the meeting, but he was justified in voting against the resolution; that his conduct did not amount to acquiescence in the ruling and that the resolution which had been passed, without a consideration of an important amendment, in consequence of the chairman's ruling, must be set aside. The Court also discussed the question as to whether the amendment moved was within the scope of the notice convening the meeting.

Windhill Local Board of Health *v.* Vint.

[L. R. 45 Ch. D. 351.]

Illegal contract—Stifling prosecution.

The plaintiffs (a local board) brought an indictment against the defendants, for interfering with and obstructing a public road.

At the trial it was agreed that the defendants should restore the road in seven years to the satisfaction of the surveyor, and the plaintiffs should consent, after that was done, to a verdict of "not guilty." The Court approved of the compromise, and a deed was executed between the parties in accordance therewith. The de-
[*129] fendants failed to restore the road and the *suit was brought by the plaintiffs to enforce the covenant. *Held* by the Court of Appeal, that as the indictment was for a public injury, the agreement which had the effect of withdrawing a prosecution from the Court of justice, was illegal and void, and that neither the fact that the agreement was calculated to secure a benefit to the public, nor that the stipulation in the contract was to the same effect as the object of the prosecution, rendered the agreement valid.

[*Keir* v. *Leeman*[1] followed. *See S.* 23 of the Indian Contract Act.]

Adams *v.* Adams.. [L. R. 45 Ch. D. 426].

Annuity—Defeasance—Interference with trustee's management.

A testator gave his freehold property to trustees, on trust to pay the plaintiff an annuity for life, and after his death for his unborn sons in fee, provided always that if the plaintiff intermeddled or interfered with the management of the real and personal property, or if he attempted to do so, his annuities should cease. The residue was devised to *E.A.* one of the trustees. *E.A.* entered into possession and paid the annuities. The plaintiff charged *E.A.* with waste, non-payment of the annuities, and allowing the buildings to be out of repair, and sued for an injunction and a receiver. The Court held the charges false, and holding the action frivolous and groundless, and viewing it as an attempt to interfere in the management, declared the plaintiff to have forfeited the annuities.

De Francesco *v.* Barnum. [L. R. 45 Ch. D. 430].

Infant's capacity—Apprenticeship contract—Unreasonable conditions.

The Court *held* that the exceptions to the rule as to the incapacity of an infant to bind himself by contract, namely, a contract

1. (1844) 6 Q. B. 308, (1846) 9 Q. B. 371.

for his good teaching and instruction whereby he may profit himself, and a contract for labour in return for wages, are subject to this qualification among others, that extraordinary or unusual stipulations, which make it unreasonable, will invalidate the contract. The provisions of a deed of apprenticeship between the plaintiff, the infant, and her parent being unreasonable:—*Held* that they could not be enforced against the infant or parent, and that no action lay against a stranger, for enticing away the infant from the plaintiff's employment.

In re **Eyton Bartlett** *v.* **Charles.** [L. R. 45 Ch. D. 458].

Fund in a separate account—Encumbrancers—Contribution for breach of trust—Priority.

The defendant and one P. E. Eyton were administrators to the estate of M. Eyton. For certain breaches of trust as administrators, they were held jointly and severally liable to the estate of M. Eyton in a certain amount, which was recovered in 1889 from the estate of P. E. Eyton then under administration. P. E. Eyton had died before 1886 leaving a will under which the defendant was entitled to an annuity. An order was made, in an administration action relating to P. E. Eyton's estate, to which the plaintiff as a beneficiary was a party, for the investment of a capital sum sufficient for the annuity, to be carried to the defendant's account. The defendant created a charge upon her interest in the annuity, in favour of certain encumbrancers. The plaintiff applied to reopen the order, on the ground that the defendant could not take the annuity, without contributing her half share of the loss consequent on the breaches of trust.

The Court held that as the encumbrancers had a *bona fide* charge on the *annuity without notice, and on the faith of the order [*130] to which the plaintiff was a party, it could not be set aside so as to affect them.

In re **Anderton and Milner's Contract.**

[L. R. 45 Ch. D. 476].

Usual covenant—Proviso for re-entry—Non-payment of rent.

On an agreement to lease for a term "subject to usual covenants to insure from loss by fire, repair, and pay rent and all out-goings," 'conveyancing counsel' prepared a lease containing a proviso for

re-entry, not only for non-payment of rent, but for breach of any of the clauses, etc. The court held that a proviso for re-entry ought only to be made to extend to the non-payment of rent.

Bellamy v. Debenham. [L. R. 45 Ch. D. 481]

Contract in letters—Subsequent correspondence—Specific performance.

Held that though, when a contract is contained in letters, the entire correspondence should be looked at, yet if a definite offer has been made and accepted, and the letters of offer and acceptance contained the whole terms agreed on, the complete contract thus determined cannot be affected by the subsequent correspondence.

***In re* Card Savings Bank: Davies' Case.**

[L. R. 45 Ch. D. 537.]

Savings Bank—Manager—Neglect—Liability.

Any trustee or manager of a Savings Bank, who neglects to comply with the rules of the bank within the meaning of S. 11 of the Masters Savings Banks Act, 1863, may be compelled under S. 165 of the Company's Act, 1862, to pay an adequate sum towards the assets of the bank as compensation for loss caused to the bank by the neglect; but he cannot be made a contributory in the winding up of the bank, or be called upon to contribute to the costs and charges of the liquidation.

Griffith v. Pound. [L. R. 45 Ch. D. 553.]

Mortgage—Consolidation—Notice to pay off one mortgage—Election—Debenture-holders of equity of redemption—Parties.

A mortgagee holding several mortgages executed by the same mortgagor (the mortgagee having excluded 44 and 45 Vic. Ch. 41, S. 17), is entitled to consolidate, although he has given notice to the mortgagor to pay off one mortgage and the latter has tendered the money, the doctrine of election having no application. When debenture-holders have a charge upon the equity of redemption of one mortgage, purchased by a company, it was held that they must be made parties to a foreclosure action under Order 16, Rule, of 1883.

Thynne v. Shove. [L. R. 45 Ch. D. 577.]

Sale of business including trade cards bearing name—Purchaser how far entitled to use name.

When the plaintiff sold his business and good-will and stock in trade, including trade cards bearing his name, but made no assignment of the right to use his name, *held* that the defendant, by virtue of the assignment of the good-will, was entitled to use the plaintiff's name for the purpose of shewing that the business was the same as that which had been carried on by the plaintiff, but he must not so exercise it as to expose the plaintiff to liability and that an injunction might therefore issue.

In re Richard Humber v. Richards.

[L. R. 45 Ch. D. 589.]

Equitable mortgage—Conflicting equities—Priority.

When a solicitor who had received his client's money for investment, represented to the latter, that as certain *mortgage which had been taken by himself was taken for the client, and continued to pay interest to him, it was *held* that the solicitor was a trustee of the mortgage for his client and that a deposit of the title deeds of the mortgaged property with his bankers, to secure an overdraft by the solicitor, gave no right to the bank to claim priority over the client, by reason of prior notice to the mortgagors. [*131]

In re New Chili Gold Mining Company.

[L. R. 45 Ch. D. 598.]

Company—Forfeiture without notice—Irregularity—Damages.

The direction of a company forfeited the shares of a member for non-payment of calls without giving notice of such forfeiture; *held* that the member was entitled to prove damages for the irregularity in competition with creditors, in liquidation.

The Queen v. Vestry of St. Mary, Islington.

[25 Q. B. D. p. 523.]

Burial Act 1885 (18 & 19 Vic., C. 128)—*Repayment, meaning of.*

The expression *repayment* is construed as meaning not necessarily the payment of money actually spent out of pocket by the

person entitled to repayment, but also payment of the amount in respect of which such person has incurred a liability. The Burial Act 1885 (18 and 19 Vic. Ch. 128) enacts, that disused churchyards and burial grounds shall be maintained and repaired by the church wardens, and the expenses shall be repaid by the overseers, upon the certificate of the church wardens. The vestry of Islington passed resolutions directing the maintenance and repair of the closed church yards and burial grounds of St. Mary, by the church warden, and sanctioning extensive alterations to the walls of the burial ground. The church warden, acting on the sanction obtained, entered into contracts regarding the work, by which he rendered himself liable to the extent of £ 500. Before entering into the contract, he wrote a precept to the vestry, requesting payment of the £500. The vestry having refused payment, a mandamus was applied for, to compel the defendants to pay this amount. Two pleas were chiefly raised : 1st that the church warden was not entitled to the repayment of what he had not spent in the first instance. On this, the Court *held*, that repayment includes cases in which the church warden, acting under the authority of the vestry, had made himself liable for the expenses. The second contention was that there was no certificate, or sufficient certificate, of the church warden in the case, as required by the statute. This was also overruled, and the letter of the church warden; referred to, was held to be a sufficient certificate.

In re **Smith** *ex-parte* **Hepburn.** [25 Q. B. D. 537.]

Banhruptcey Act 1883, S. 55, Sub. *S.* 6—*Leasehold property—Disclamier by trustee—Assignment of underlease.*

A party is not permitted to evade his duties and responsibilities by a sham transfer of his rights to another. By the terms of S. 55 of the Bankruptcy Act 1883, Sub-S. 6, when the trustee of a bankrupt having a lease-hold interest over any property disclaims the lease with the sanction of the Court, the Court may, when there is an under-lessee or mortgagee by demise of the lease-hold interest, pass an order vesting in him such property subject to the same liabilities and obligations as the bankrupt, in respect of the property, and if the mortgagee or under-lessee decline to accept the vesting order, he is excluded from all interest in, and security upon,
[*132] such property. In this case* after the trustee in bankruptcy had disclaimed the lease, an under-lessee, by way of mortgage,

executed an assignment of the under-lease to a third person who, however, made a declaration that he would stand possessed of the debt and the security in trust for the assignor, to be disposed of according to his pleasure. *Held*, the arrangement did not relieve the assignor from the operation of S. 55, Sub-S. 6, as it was not a real assignment, and that he must be excluded from all interest in, and security upon, the property, unless he submitted to a vesting order as provided therein.

LIABILITY FOR NEGLIGENCE.* [* 133]

THE January number of the *Indian Jurist* contains some observations on the opinion expressed by Sir Frederick Pollock in the 2nd Edition of his Book on Torts,[1] p. 45, that the decisionof the Privy Council in *Victorian Railways Commissioners* v. *Coultas*[2] is not satisfactory, and that the opinion of the Judicial Committee, outside the Colony of Victoria, is extra-judicial. Our legal contemporary, while thinking that the decision is unsound, questions the correctness of the remarks of Sir Frederick Pollock as to the binding character of the decision, outside the Colony of Victoria. We do not propose to discusss this question, as we entirely concur in the remarks of our contemporary, and think that the decision which is not based on any peculiarity of the law of Victoria on the subject, would be binding on all the tribunals in India and in the various colonies, subject to the appellate jurisdiction of the Privy Council[3]. In so far as the courts in England are concerned, it is doubtful whether they will be bound to follow implicitly the decisions of the Privy Council. There is no doubt

1. 7th Edn., pp. 50, 51. 2. (1888) 13 A. C. 222.

[3. This question *viz.*, whether a decision of the Privy Council in a case arising from the Colonies is binding upon the Judicial Committee in cases arising from India is important as the decision of the Privy Council, in the case under notice, is hardly satisfactory and is quite opposed to modern science and the trend of judicial opinion. The decision, it may be noted, has not been followed in England (See note i, *infra* p. 98.) It has not been followed in most of the States in America. The question is whether Indian Courts are bound to follow it. Apart from the question whether the decision can be said to have laid down any principle of law (and the mere fact that it is laid down in any given case that nervous shock cannot be taken into account in assessing damages or that damages cannot be recovered for nervous shock can hardly be taken to be a statement of any general principle) we think that the mere fact that their Lordships of the Privy Council, in a case arising from the Colonies lay down as a general principle of English Law applicable to the Colony that damages cannot be recovered for nervous shock, cannot make the decision *ipso facto* binding in cases arising in India. The

that they will show the greatest deference to the opinions expressed by such an august tribunal, but we think that they will exercise their own independent judgment in coming to a conclusion on the matter.[1] The point which we propose to discuss is the correctness of the decision commented upon by Sir Frederick Pollock. The facts of the case stated in the judgment are as follows : On or about the 8th of May 1886, about nine in the evening, the plaintiff James Coultas and Mary Coultas, his wife, who were the respondents in the appeal to the Privy Council, together with John Wilson, a brother of the wife, were driving home in a buggy from Melbourne to Hawthorn, which is near Melbourne. They had to cross a level crossing on the line of Railway from Melbourne to Hawthorn. When they came to it, the
[* 134] gates* were closed, and the gate-keeper came and opened the gates nearest to them, and then went across the line to the gates on the opposite side. The respondents followed him, and had got partly on to the up-line (the farther one) when a train was seen approaching on it. The gate-keeper directed them to go back, but James Coultas who was driving shouted to him to open the opposite gate, and went on. He got the buggy across the line, so that the train, which was going at a rapid speed, passed close to the back of it and did not touch it. As the train approached, Mary Coultas fainted, and fell forward on her brother's arms. The medical evidence showed that she received a severe nervous shock from the fright, and that the illness, from which she afterwards suffered, was the consequence of the fright. One of the plaintiff's witnesses said that she was suffering from profound impression on the nervous system, nervous shock, and the shock from which she suffered would be a natural consequence of the fright. Another said, he was unable to detect any physical damage ; he put down her symptoms to nervous shock. The jury found that the defendant's servant negligently opened the gate, and invited the

Rules of English Law are not as such binding in this country ; only, such rules as are in consonance with justice, equity, and good conscience may be applied by the British Indian Courts in the absence of any specified law or usage. *A fortiori*, some supposed rule of English Law which is not followed even in England cannot be said to be binding upon British Indian Courts :—ED.]

[1. In fact the Privy Council decision has not been followed in England. *Dulieu* v. *White & Sons* (1901) 2 K.B. 669. See also *Pugh* v. *London, Brighton and South Coast Railway Co.* (1896) 2 Q. B. 248 ; *Bell* v. *Great-Northern Railway Co.* (1890) 26 L. R. (Ir) 428. *Wilkinson* v. *Downton* (1891) 2 Q.B. 357 :—ED.]

plaintiffs to drive over the level crossing, when it was dangerous to do so, and the plaintiffs could not have avoided what had occured, by the exercise of ordinary care and caution on their part; and they assessed the male plaintiff's damages at £ 342-2, and the female plaintiff's at £400. Two of the points reserved for consideration by the full Court were—

(1) Whether the damages awarded by the jury to the plaintiffs or either of them are too remote to be recovered?

(2) Whether the female plaintiff can recover damages for physical or mental injuries or both, occasioned by fright caused by the negligent acts of the defendants?

The full Court answered that the damages awarded were not too remote to be recovered, and that the female plaintiff could recover damages for physical and mental injuries occasioned by the fright. From this jndgment an appeal was preferred to the Privy Council. Their Lordships lay down the general principle of law that the damages must be the natural and reasonable result of the defendants' act; such a consequence as in the ordinary course of things would flow from the act. In applying this principle to the facts of the case, they refer to the evidence of the *female plaintiff, that her fright was caused by seeing the train [* 135] approaching, and thinking they were going to be killed. Their Lordships proceed to say that damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances[1] be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper. To hold so would, they say, 'be extending the liability for negligence 'much beyond what that liability has hitherto been held to be. 'Not only in such a case as the present, but in every case where 'an accident caused by negligence had given a person a serious 'nervous shock, there might be a claim for damages on account 'of mental injury. The difficulty, which now often exists in case 'of alleged physical injuries, of determining whether they were 'caused by the negligent act, would be greatly increased, and a 'wide field opened for imaginary claims.' They refer to the absence of any decision of the English Courts, in which, upon such facts as

1. This shews that the decision of the Privy Council is one based more upon the facts of the case than upon any general principle.

were proved in this case, damages were recovered, and hold that the present case is distinguishable from the cases similar to *Sneesby* v. *Lancashire and Yorkshire Railway Company*[1] where the defendants were held liable to pay damages to the plaintiff, for loss of cattle sustained by him, through defendants' negligently sending some trucks down an incline into a siding, while plaintiff's cattle were crossing it, which frightened the animals so much that they got separated from the drivers and rushed away from their control, and breaking through the fence of a garden, which was defective, got to another part of the railway a mile off, where they were found dead or dying. The Court held in that case that the result of the negligence of the defendants' servants was two-fold: 'First, the trucks separated the cattle from their 'keepers; secondly, the cattle were frightened and became infuri- 'ated and were driven to act, as they would not have acted in 'their natural state. Everything, that occurred or was done after 'that, must be taken to have occurred or been done continuously; 'the cattle rushed on in a state of fury, passed along the occupa- 'tion road, charged the fence of the garden, and so got on to the 'Railway, and were ultimately killed. It is no answer on the part 'of the defendants to say that the fence was an imperfect fence. 'It might just as well have been that there was no fence at all.'
[*136] The *Indian Jurist* asks, if damages *can be awarded for the results of fright to animals, why not for the results of fright to a human being? It appears to us that, in making this remark, the writer of the article in question has misapprehended the point, which arose for decision in the case before the Privy Council. There is no doubt that, when a person is liable for the results of fright to animals, he will be liable for similar results to a human being as well. The question is, for what kind of results of fright to animals or to human beings, he is liable. If a man is guilty of negligence, and as the consequence of such negligence an animal is placed[2] in a position of danger to life or limb, and to avoid such impending danger, the animal physically exerts itself and sustains injury as the result of this physical exertion, the person who was guilty of negligence would be liable for such injury. This was the point decided in *Sneesby* v. *Lancashire and Yorkshire Railway*

1. (1875) 1 Q. B. D. 42.

2. The more accurate way of putting it will be "thinks is placed." Will the same answer be given then? :—ED.

Company[1]. If the word man is substituted for animal, the proposition would still be a correct proposition of law. If, in the case now under consideration, Mrs. Coultar had tried to jump out of the carriage and had thereby sustained injuries, we have no doubt the Privy Council would have upheld the judgment of the lower Court and awarded damages to the plaintiffs. But the facts of the case were different. The harm said to have been done to her was not the result of any physical act of the female plaintiff to ward off the impending danger, but was the direct result of the fear and anxiety produced in her mind by a sense of the impending danger, and the question is, whether the law recognizes such consequences as the natural and reasonable result of the defendants' act. We respectfully beg to suggest that the law does not recognize them as the natural and reasonable result of the defendants' act, and that the Privy Council was perfectly right when it refused to establish such a precedent for the first time. We shall briefly deal with the objections raised by Sir Frederick Pollock. He puts the problem to be solved in this way. When a wrongful or negligent act of *A* threatening *Z* with immediate bodily hurt, but not causing such hurt, produces in Z a sudden terror or nervous shock, from which bodily illness afterwards ensues, is this damage too remote to enter into the measure of damages, if *A's* act was an absolute wrong, or to give *Z* a cause of action if actual damage is the gist of the action. He concedes[2] that the passion of fear or any other emotion of the mind, however painful and distressing it may be, and however *reasonable the apprehension which causes it, cannot [* 137]
itself be regarded as reasonable temporal damage[3], and that the

1. (1875) 1 Q. B. D. 42.

[2. Mere mental pain or anguish unattended by any injury to the person cannot sustain an action. *Lynch* v. *Knight* (1861) 9 H. L. C. 577 (598); Beven on Negligence (2nd Edn.) Vol. 1 p. 77. This must, however, be distinguished from causes where there is a cause of action otherwise as in cases of personal wrongs or as in some cases of trespass where mental anguish may well form an element in assessing damages. In cases of defamation or of seduction damages may be assessed for mental anguish. In one case the plaintiff in an action for breaking and entering his house was allowed to shew the character of the entry, (*i.e.*, that the entry was outrageous and violent which so terrified the defendant's wife that she fell ill and died) in order that the jury may consider in assessing damages. See *Huxby* v. *Berg* (1815) 1 Stark 98. See also Clerk and Lindsell on Torts. (3rd Edn.) p. 127 :—ED.]

[3. Apparently we take it that the learned author intends to distinguish between mere fright or terror and fright or terror causing some physical injury that is between pure mental shock or a shock to the moral or the intellectual sense merely and a nervous hock or a shock to the nerve and brain structures of the body :—ED.]

judgment of the Court in Victoria, if and so far as it purported, to allow any distinct damages for 'mental injuries' was erroneous.[1] We may take it then that the two following propositions are beyond all reasonable doubt:—

(1) If the defendant is guilty of negligence and the plaintiff suffers in consequence thereof an actual physical injury, the defendant is liable to pay damages to the plaintiff for the physical injury sustained by him.

(2) If the defendant is guilty of negligence and the plaintiff sustains in consequence thereof purely mental injuries, however painful or distressing, unattended with any physical injury, the defendant is not liable to pay any damages to the plaintiff.

The third proposition, which the Privy Council hold to be unsound in law, may be stated as follows :—

(3) If the defendant is guilty of negligence, and the plaintiff sustains in consequence thereof mental injuries, and these mental injuries result in physical injury, the defendant is liable to pay damages to the plaintiff.

The proper way to view the question, according to Sir Frederick Pollock, in such cases, is whether the fear, in which the plaintiff was put by the defendants' wrongful or negligent conduct, was such as, in the circumstances, would naturally be suffered by a person of ordinary courage and temper, and such as might thereupon naturally and probably lead in the plaintiff's case to the physical effects complained of.[2] We would accept this statement of the point to be considered in such cases as correct if the words *in the plaintiff's case* be omitted, because the law of negligence cannot vary according to the health, strength, courage, sex and age of the plaintiff in each case.[3] If the defendant is to be liable for the physical consequences of fear, anxiety, or any other emotion of the mind, he must be so liable whether the person so suffering the physical consequences is old or young, strong or

1. Pollock on Torts 7th Edition pp. 50, 51.

2. *Ibid* p. 51 ; 2nd Edition pp. 46, 47.

[3. Although the law of negligence may not vary according to the health, strength, courage, sex and age of the plaintiff in each case, damage resulting from negligence may vary according to those circumstances. These will be proper circumstances for considering whether the mental shock was a natural and probable cause of the physical injury. The measure of damages will certainly vary according to those circumstances :—ED.]

weak, bold or timid, and whether the person is a male or a female.[1] It may be that terror may not produce the same disastrous results in the case of a grown-up man as in the case of a child, but if the results are produced even in the case of a grown up man, the law *cannot decline to award damages for the injury done to him. [* 138] Taking then that the proper question to be put in such cases is in the modified form we have suggested, the Privy Council has answered it by saying that, judged by the past history of English law, physical injury is not the natural and probable result of fear.[2] If it is the result in any particular case, it must be owing to the peculiarity of the physical and mental constitution of the individual concerned.[3] If a person, knowing the peculiar mental and physical constitution of a particular individual, is guilty of an illegal act of omission or commission, he is liable in the eye of the law, because malice is then imputed to him. But it is not necessary to prove malice to create liablity in cases of negligence. Sir Frederick Pollock says that fear taken alone falls short of being actual damage, not because it is a remote or unlikely consequence, but because it can be proved and measured only by physical effects. This statement appears to us to be a pure assumption. In the first place, it is not correct to say that fear can be proved and measured only by physical effects. The extent and intensity of the fear felt by an individual may be proved by the evidence of the person who felt it, and the amount of credibility attaching to the statement would depend, just as it does in other cases, on the character of the person deposing, the sufficiency of the cause

[1. No doubt if physical consequences follow from mental shock, the defendant will be liable for those consequences whether. the person suffering from the physical consequences is old or young, etc. But the circumstance that a person is old or young, strong or weak, bold or timid, male or female, will be relevant to show whether the physical consequences complained of are the natural and probable result, of the mental shock.

2. What has the history of the English Law to do with the question whether any particular injury was or was not the natural and probable result of fear ? It is only a question of fact to be determined from the facts and circumstances proved.

3. It could not be said that physical injury could not follow, as a matter of law, from mental shock. The extent and nature of the physical injury will vary with the constitution of each person. From S. 93 of the Indian Penal Code, a communication made in good faith is not an offence by reason of any harm it may cause to the person to whom it is made. But for this exception a communication which has the effect of causing mental shock which in its turn causes a physical conequence as where death is caused thereby, would constitute an offence under the Code. The exception will not apply where the communication is not made in good faith. If it is an offence under the criminal law of India it must equally be a civil wrong :—ED.]

which provoked the feeling, and a number of other circumstances. Nor do we accept the reason assigned for the non-liability of a person, whose negligence merely produces a mental shock to another, as correct. We rather think that it is based on principles similar to those, which guided the legislature in framing S. 95 of the Indian Penal Code, which runs as follows: 'Nothing is an offence by reason that it causes, or that it is intended to cause, or 'that it is known to be likely to cause, any harm, if that harm is 'so slight that no person of ordinary sense and temper would com- 'plain of such harm.' If the reasoning of the Judicial Committee is correct, Sir Frederick Pollock says, it becomes rather difficult to see on what principle assault without battery is an actionable wrong. We do not see the force of this remark. The learned author has himself admitted that mental injuries do not by themselves form a ground for an action. If the basis of the action for assault without battery is the 'mental injury' suffered by the person assaulted, then it would be contrary to the rule, the existence of which is admitted by Sir Frederick Pollock
[*139] *himself. On the other hand, we believe the basis of the action to be, not the mental suffering of the person assaulted but the mental and physical attitude of the person assaulting, which shows an intention to inflict a wrong on another, and the law punishes it, when it is accompanied by capacity to carry out the intention at once. In the words of Mr. Mayne (Commentaries on the Indian Penal Code,[1] p. 305), 'an assault is an attempt to commit a forcible crime against the person of another. Mere words can never amount to an assault, but any acts or gestures, which indicate such an attempt with a present possibility of carrying out the intention are sufficient.' We do not, therefore, see any reason to think that the law as laid down by the Judicial Committee is not correct. [As has been observed by Mr. Beven in his book on Negligence, 2nd Ed. p. 79, the starting point of the reasoning in the decision of the Judicial Committee in the case under notice is that nervous shock and mental shock are identical and that both are opposed to actual physical injury. The effect of terror is almost invariably to produce nervous disorder not through the action of intelligent or moral feelings, but directly and in regular sequence; nervous disorder when manifesting itself by miscarriage and

[1. The reference is to the 13th Edn. (notes on S. 351). Cf. Mayne's Criminal Law, 3rd Edn., para 414, page 634 :—ED.]

long illness can hardly be described as a mental shock. Fright causing physical injury to beasts has been the subject of damages. A different principle cannot apply where the fright causes physical injury to man or woman and there can be no doubt that nervous disorder is a substantial physical injury. A distinction may and ought to be drawn between a mental and a nervous shock. No further distinction can be drawn between a nervous shock and a physical injury.

The decision of the Judicial Committee in the case under notice has been the subject of various comments in various journals[1] and in several cases. It must now be taken to be settled that damages may be recovered for nervous shock or disorder caused by fright or terror or other mental condition.

The second point left open by the Judicial Committee has been the subject of actual decision in the English Courts, and it must be taken to be settled there that no actual impact is necessary to be shown to entitle a plaintiff to recover damages for nervous shock occasioned by fright. (See *Dulieu* v. *White*[2]; Clarke and Lindsell on Torts, 3rd Edn. p. 489; see also Mayne on Damages, 7th Edn., p. 54.)

In the American Courts the decision of the Judicial Committee has not been followed in most of the States, but in New York there is a case, *Mitchell* v. *Railroad Company*,[3] apparently following the decision of the Judicial Committee. Notwithstanding this we are not inaccurate in stating that the trend of

1. [NOTE.—The liability of Telegraph Companies for damages for injuries to the feelings is discussed in 25 Am. L. Review 1027; 28 Am. L. Rev. 919; 29 Am. L. Rev. 209 to 228 where all the American cases are discussed. See also 37 Am. L. Rev. 613. See again 2 Harvard Law Review, p. 146; 5 Harv. L. Rev. 41; 6 Harv. L. Rev. 260 and 265. The general question has been discussed by several writers. Some have taken the view that injuries from fright are actionable. See 26 Am. L. Rev. 449 and 26 Am. L. Rev. 599 to 602 which is a reprint of Mr. Strangman's Article in 3 Bombay Law Reporter, p. 1. Others have taken the opposite view. See 32 Am L. Rev. 298 and 37 Am L. Rev. 280. The distinction between mental suffering as giving rise to a cause of action and mental suffering to be taken as an element in assessing damages is pointed out in 26 Am. L. Rev. 599 and 7 Harv. L. Rev. 121. A few conflicting cases are referred to in 28 Am. L. Rev., p. 302 and 38 Am. L. Rev. p. 775. The decision of the Privy Council has been followed in the New York Court of Appeals. See *Mitchell* v. *Railroad Company*, 151 N. Y. 107. The latter decision is referred to in 31 Am. L. Rev. p. 917 and is severely criticized by Mr. Norton, the editor of the University Law Review. See 31 Am. L. Rev. 785.—ED.]

2. (1901) 2 K. B. 669.

3. 151 N. Y. 107 see note (1) *supra*.

decisions in the American Courts is to award damages for nervous disorder caused by mental shock. Apparently the Privy Council have been guided in their decision upon some apprehension or policy that the award of damages under the circumstances noticed by them would tend to promote false suits. Policy, however, is always an unstable ground of decision, and, to hold that nervous disorder arising from mental shock is not a proper ground for action, would be going against all modern research, and scientific thought:—Ed.]

[* 139] ## THE HINDU GAINS OF LEARNING BILL.*

We invite the attention of our readers to the Bill, introduced by the Honorable Vembakum Bashyam Iyengar last month, to declare gains of learning by a Hindu to be his separate property. The event is, in our opinion, a very noteworthy one in the annals of local legislation. If our recollection serves us right, this is the first genuine instance of a Bill, originating with a non-official native member, finding its way into the Madras Council, since the abortive attempt, made by the late Honorable Vembakum Sadagopa Charlu, more than a quarter of a century ago in a somewhat similar matter, but with very different aims and objects.

The present Bill has nothing whatever to do with any matter in which the executive administration of the Presidency is directly interested, and, if the honorable member should succeed in getting it passed into law, the charge, so often brought forward, that the local Legislative Council exists merely for registering the edicts of the executive, cannot in fairness be repeated in future with any great force.

We welcome the Bill for a much stronger reason, *viz*:—that the subject proposed to be dealt with, is an important branch of Hindu Law, pressing for immediate consideration. No one, that has carefully watched the administration of that law, can deny that the necessity for legislative action in connection with it has frequently arisen. It is impossible that, in the nature of things, it
[* 140] *can be otherwise. No civilised people can hope to get on satisfactorily, for any great length of time, without occasional legislation of some sort, even in matters connected with the law of inheritance. When it is remembered that the Hindu Law of inheritance and

partition is a peculiar system, to be gathered chiefly from books written centuries ago in a language at present unspoken, and made accessible to the very large majority of the Judges engaged in administering it (only) through incomplete translations, it is no wonder that results have often followed that require to be set right without delay.

The observations of *Muthusamy Aiyar* J. concurred in by *Parker* J. in *Venku* v. *Mahalinga*[1] show how strongly the Judges of our High Court set their faces against any attempt to get them to repudiate a rule of Hindu Law or custom once recognised, however objectionable such rule or custom may be shown to be. In declining to follow a very learned decision of that eminent Judge (*West* J.) in *Mathura Naiken* v. *Esu Naiken*[2] as to the invalidity of adoptions among dancing girls, *Muthusamy Aiyar* J. in effect lays down that judiciary legislation, appropriate to earlier periods, must cease now-a-days, and the Judge should strictly adhere, not merely in theory but in practice, to the rule *jus dicere.*[3] We can scarcely quarrel with the position thus stated.

In these circumstances, legislative interference becomes an absolute necessity, if the evils unavoidably springing up in the course of time in the administration of the Hindu Law, are to be at all corrected, and if the people of this country are to be rescued from an intolerable thraldom to antiquated customs and rules, enforced by our Courts, however pernicious or opposed to general welfare such customs and rules may happen to be. The wise policy of general non-interference, observed by our rulers in such matters, naturally makes the official members of the Council disinclined to initiate legislative action as to those matters. The people must, therefore, look mainly to the non-official native members *for the timely introduction of measures calculated to bring the [* 141] administration of that important branch of the law—the Hindu Law—into harmony with the conditions and requirements of modern Hindu Society.[4]

1. (1888) I. L. R. 11 M. 400, 401. 2. (1880) I. L. R. 4 B. 545.

3. *Muttukannu* v. *Paramasami* (1888 I. L. R. 12 M. 214) is highly instructive on this point and shows to what length the Judges are prepared to go. *Muthusamy Aiyar* and *Parker* JJ. decided (in this case) that a dancing girl can validly adopt several girls though such adoptions are made for adding to the gains of the adoptive mother, by employing the girls, when they attain their age, for purposes of prostitution ! The evidence accepted and acted on in the case placed no limit on the number of such adoptions

4. While it may not be useful to revive recollections of old sores, it may here be pointed out that Sir Bhasyam Aiyangar made a wrong beginning in attempting

The Bill in question is clear proof that the Honorable V. Bhashyam Iyengar has fully realised his responsibility, in the matter, to the community that he so worthily represents in the Council. The honorable member has done *his* duty, and it remains with those interested in the proper administration of the law to show clearly that, in their opinion, the Bill deserves the cordial support of His Excellency, the President, and the other members of the Council. We hasten, therefore, to express our unqualified approval of the Bill, its principle, scope and objects. The statement of objects and reasons, which is as full as it should be, as well as the very able speech of the Honorable Mover affords ample materials for a correct comprehension of the various aspects of the question alike by laymen and lawyers. The provisions of the Bill are agreeably short, simple and clear, and we trust that they will be found acceptable to all.

It is a pleasure to note the equitable and liberal spirit which pervades the utterances of the *Smriti* writers (with almost a solitary exception) on the subject of the Bill, and it forms quite a refreshing contrast to the narrow views of the later commentators and the Judges, who followed these commentators. Nor are those ancient writers the only authorities that support the framer of the Bill. The opinion of all the Judges including their Lordships of the Privy Council, that have approached the subject without prepossession, is distinctly in favour of the principle of the Bill, as pointed out by the honorable member. Indeed the propriety of conceding to the acquirer the sole and independent right to his gains by learning, not merely as a matter of expediency, but of

legislation upon this particular subject. Legislation was needed upon the more important and pressing questions there were than those dealt with in the Bill, *viz.*, with respect to the rule laid down in the *Tagore case* and with respect to certain questions of inheritance such as the position of a brother's grandson and the three descendants after the great grandson, the several classes of persons comprised in the bandhu succession, and so on. On these and many other points there was and there is such a glorious uncertainty of the law as would have forced conviction in everybody that Sir Bhashyam Aiyangar did indeed realise his responsibility if he had only tried to get some at least of these uncertainties removed, and thus put a stop to much unrighteous and unwholesome litigation. The *Tagore case* and the *Sartaj Kuari case* so utterly misrepresent the Hindu Law that the restoration of the law upon the points referred to in these cases would have been welcomed by every person in this Presidency. The Zemindars should be thankful to Government for the passing into law of the Impartible Estates Act, notwithstanding that it was passed only after almost all the litigation had been over and most of the estates had been swallowed up in wasteful litigation.—ED.]

natural justice, can hardly be gainsaid by any fair-minded person. We certainly think that the honorable member has not overrated the benefits likely to flow from the proposed measure. We have no doubt that it will check wasteful, harrassing, and unrighteous litigation, remove distrust, and greatly tend to promote peace and good will among members of Hindu families. We are further convinced that the measure will lead to a profitable employment of capital, that would otherwise be locked up in jewellery or in the safe,[1] * by removing some of the serious obstacles existing in the [* 142] present state of the law, to a man, who has made money by his learning in the professions or otherwise, gratifying what with his countrymen is almost a universal passion—the investment of savings in landed property. The last, but not the least valuable result of the proposed law will be to immensely better the rights of the most prominent female members in a Hindu family. From the time the Bill becomes law, the widow or the daughter of the acquirer will, in the absence of male issue to him, take by inheritance the deceased's gains of learning, in preference to all other male members that would, under the present law, lay claim to the same by survivorship. This cannot but raise the position of those female members even in the lifetime of the acquirer. We may state that after the most careful consideration we have not been able to discover any weighty objections to the Bill. If it be said that the expenditure on the education of the junior members of the family, now incurred from an expectation of a return from such expenditure to the joint family, will cease, and their education hereafter will, in consequence, be affected, we reply that in ninety-nine cases out of a hundred no such mercenary considerations operate. In the vast majority of cases, it is the father that pays for the education of his sons. It would, we think, be a calumny[2] on Hindu character to assert that, as a consequence of the Bill, either the father will refuse to perform the duty to his son, that he now so cheerfully discharges, or that the son will, when

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[1. We now see that much of the jewellery, we mean the sale proceeds, had been very *safely* locked up in the mines of Messrs. Arbuthnot & Co.—ED.]

[2. One point is here misconceived: If English education is a means of imbibing the Western spirit and it is considered in keeping with English breeding and spirit to look after one's own self, wife and children, no question of calumny may arise. What may be considered as calumny on one side will only be regarded as the growing and progressive spirit of the age :—ED.]

by such education he is enabled to earn money, fail to deal justly, if not generously, with his father or the less favoured members of the family. The Bill, in short, aims at laying down the law in the enlightened spirit suited to modern times, and in terms free from ambiguity or difficulty, thus removing the grave uncertainty and doubt which hang round the question. The one modification of the existing law proposed, is to put the gains of special or scientific learning on the same footing as those of ordinary education. The framer of the Bill gives cogent reasons for the course he has adopted after mature consideration. Any other plan must result in impracticable and fanciful distinctions and anomalies, as pointed out in the honorable member's speech. We have noticed, so far as the limited space at our disposal on this occasion permitted, the character of the Bill and its chief advantages, and before concluding, we have only to add that it gives us very great
[* 143] pleasure to state that * the honorable member has, by the admirable manner in which he has acquitted himself in the Council, not only added to the reputation he so justly enjoys as a lawyer, but has also earned the gratitude of his educated countrymen by thus endeavouring to reform a branch of the law of such vital importance to them.

MITAKSHARA.

Having thus laid down the rules for the choice of a maiden the author lays down the rules for the choice of a bridegroom for the gift of a maiden.

55. The bridegroom should be (one who is) endowed with these very qualities, of the same caste, a srotriya, well-tested in virility, young, intelligent and popular:

"With these very" *i. e.*, with the aforesaid qualities the bridegroom should be endowed and he should also be free from defects. There is this other qualification that he must be of the same caste or he may be of a superior caste, but not of an inferior caste. *Srotriya*, *i.e.*, himself (must be) well read in the Vedas. "*Yatnat* (well), *i. e.*, carefully, tested in virility. The way or method of testing is pointed out by Narada.[1] "He whose semen floats[2] in water and whose urine is resounding (or noisy) and

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1. Narada, Ch. XII, § 13.

2. What is laid down by Narada is quite the reverse. He says " whose semen does not float." See Dr. Jolly's Edition of Narada, Ch. XII, § 13.

frothy shall be deemed virile by these marks and impotent by their opposites." "Young," *i. e.*, not old. "Intelligent," *i. e.*, clever in matters secular and religious. "Popular," *i.e.*, who has endeared himself to people by addressing with a smiling countenance and with suavity and by other like acts.

Marriage is of three kinds according as it has *pleasure* (*Rati*), *progeny* (*putra*) or *dharma* for its object. Of these, marriage for the purpose of progeny is of two sorts, *Nitya* and *Kàmya*.[1] In the case of a marriage which has for its object *nitya* offspring a woman of the same caste is shown to be the most eligible, by the rule[2] "the bridegroom must be of the* same caste." [* 144]

Now, as a permission to adopt an (or secondary) alternative in the case of (both) Nitya and Kàmya unions is proper to be stated, the author says:

56. What is said by others, viz., that for the dvijas, a wife may be chosen from the Sudra caste, is not my view, as this (individual) is himself born there (i.e., in (his wife).

What is said in the passage [3] beginning with "For men prompted by (love of) pleasure these may be brides (wives), in due order," and up to "four wives (*i.e.*, of 4 castes) for a Brahmin, three wives (*i.e.*, of 3 castes) for a Kshatriya, and two wives (*i.e.*, of 2 castes) for a Vaisya" *viz.*, that "marriage with a Sudra (is allowed) for dvijas," is not Yâjñavalkya's view. Because this *dvija* is himself born in her there, on account of the *Sruti* [4] "the wife is called a *jaya* as he is again born in her." Here by the author mentioning as a reason "that he is himself born in her," and prohibiting marriage with a Sudra woman to one desirous of or engaged in the procreation of *Nitya* offspring, or of Kamya offspring, a Kshatriya, and a Vaisya wife for a Brahmin and a Vaisya wife for a Kshatriya, are allowed in the case of the

1. The words *Nitya* and *Kamya* have no exact equivalents in English and the original words have therefore been retained. The word *Nitya* means that which is indispensable as an act of duty and should be performed, simply because it is ordained by law. It may or may not procure some advantage, but that is immaterial. *Kâmya*, on the other hand, is that which is not indispensable, *i.e.*, which is optional but is done with a view to some advantage.

2. As mentioned in the verse commented upon, see Yajñawalkya § 55.

3. Manu, Ch. III, § 12 and 13.

4. See Aitareya Brahmana VII § 13, the whole of which is cited by Kulluka in his commentary on Manu XXII § 8. *Cf.* also Manu § 8. Sacred Books of the East. Vol. XXV, p. 329 and note.

inferior or secondary alternative)[1] procreation of the Nitya of-*i.e.*, in (the case of) the procreation to the procreation of Kamya offspring.

Now he mentions the order of marriage regarding one who is desirous of sexual pleasure, or, who having begotten children and lost his wife is incompetent for any other order of life and wishes merely to remain in the order of house-holder.

57. For Brahmins, Kshatriyas, and Vaisyas, three, two and one, respectively, are permitted as wives in the order of caste (in addition to one of their own caste) and for a Sudra, one of his own.

In the order of caste, for a Brahmin three, for a Kshatriya two, for a Vaisya one. For a Sudra, one of his own caste becomes wife. And there is also for all, the chief wife, *viz.*, one of the same caste. In default of one of the preceding caste, the wife of the succeeding (or the next inferior) caste becomes the chief. And this is the order in (marriage) for the purpose of the procreation of sons both in the secondary alternative of the Nitya form and in the Kâmya form. Hence the inclusion of the son of a Sudra woman among sons, and the recital[2] of a share for him. So also
[* 145] *verses beginning from "(Born) to a Brahmin, a Murdhavasikta"[3] up to "This is the rule among married women" applies to one (a son) begotten incidentally[4] (*i. e.*, not with that object) by a person desirous of mere sexual pleasure or of merely (remaining in) the order a house-holder.

The author now mentions the (various kinds of) marriages.

58. The Brahma marriage is that in which after inviting (the bridegroom), the girl adorned according to the means (of the parents) is given. A son born of her purifies 21 generations in both.[6]

That marriage is called *Brahma*, in which a maiden adorned according to the ability (of her parents) is given after the pouring of water to a bridegroom who is of the description already stated

1. *i.e.*, in the case of procreation of Nitya offspring by the employment of a secondary alternative.

2. There is some difference of reading in the different editions.

3 Yajnavalkya Vyavaharakanda. § 125.

4. Yajñavalkya Acharakanda, § 91 and 92.

5. The Sanskrit term is *nântarîyakatayâ* *i.e.*, begotten not with the object of begetting sons.

6. [This means both the paternal and maternal lines according to Apararka. But apparently the Mitakshara takes it to be the ascending and descending lines and this accords with the verse of Manu on the subject :—Ed.]

and who is invited. A son born of her, if well-behaved, (virtuous), purifies in both, the ten (generations above), beginning with the father, the ten (generations below), beginning with the son, and himself the twenty-first.

59. Where the girl is given to a priest officiating at a sacrifice (that marriage is) Daiva ; (where she is given) on receipt of a pair of cows, Arsha. One born of the first purifies 14 and one born of the latter, 6.

That is the *Daiva* marriage, in which, when the performance of a sacrifice has been completed, the maiden, adorned according to means, is given to the sacrificial priest. But where the maiden is given on receipt of a pair of cows, that is *Ârsha*. One born of the first, *i.e.*, one born of a *Daiva* marriage, purifies 14, *i.e.*, seven below and seven above. One born of the latter, *i.e.*, one born of an *Ârsha* marriage, purifies 6, *i.e.*, three above and three below.

60. That is Kaya marriage where a girl is given to a suitor with the words : "Let them fulfil their duties jointly." A son born of her will purify 6 generations on each side as well as himself.

Prâjâpatya marriage is the gift of a maiden after pronouncing the words : "Let them fulfil their duties jointly." One born of her purifies 6 above and 6 below, and including himself purifies 13.

61. * The Asura by the receipt of money, the Gandharva by mutual engagement, the Rakshasa by capture in battle, and the Paisacha by fraud on the maiden. [* 146]

And as for the *Âsura*, it is by the receipt of money, while the *Gândharva* is made by mutual love. The *Râkshasa* is by carrying away (or by) battle ; while the *Paisâcha* is by fraud on the maiden. "By fraud" (छलेन) *i.e.*, by device, as by carrying away during sleep and other like conditions.

The author describes a peculiarity in a marriage with one of the same caste, &c.

62. In the case of women of the same caste (as the husband) the hand[1] should be taken hold of. In marriage with one of the three superior castes, the Kshatriya maiden shall hold an arrow and a Vaisya maiden, a goad.

In marriage with women of the same caste, it is the hand alone that should be taken according to one's own *Grihya* ritual.

1. The bridegroom should take hold of the bride's hand.

But in marriage with one of a higher caste, a Kshatriya maiden shall hold an arrow[1], and a Vaisya maiden a goad (or whip), while a Sudra maiden shall hold the hem of the (husband's) cloth. As Manu has said[2] : "The hem of the cloth should be held by a Sudra maiden on marriage with one of a superior caste."

The author recites the order of persons entitled to give in marriage.[3]

63 & 64. The father, the paternal grandfather, the brother, the Sakulya, and the mother[4] (जननी) if in possession of their faculties, are (in succession) the givers of the maiden, each succeeding person becoming the giver in default of the preceding person.[5] In default of giving, the person (so defaulting) incurs the sin of killing an embryo at each menses. In the absence of givers, the maiden may choose an eligible husband for herself.

Out of these persons beginning with the father, in the absence of each preceding person, each succeeding person is the giver of the maiden, if in possession of his faculties, *i.e.*, if he is free from madness and other like defects. Therefore he who being competent (to give) does not give, incurs the sin of killing an embryo (procuring abortion) at each monthly period. And this must be explained (or expounded) (as referring to cases) when a bridegroom of the description given is obtainable.[6] Where, [*147] however, there is an * absence of givers, the maiden herself

[1. Which arrow should be taken hold of by the bridegroom in the place of the hand (as in a savarna marriage) :—Apararka. Cf. also Narada]

2. Manu III. § 44. Sacred Books, Vol. XXV, p. 83.

3. Cf. Manu V § 151, Sacred Books, Vol. XXV, p. 195.

4. The natural mother. This includes the adopting mother. See *Annapurni Nachiar* v. *Forbes* (1899) L. R. 26 I. A. 246 ; s. c. I. L. R. 23 M. 1.

5. [But see as to enforceability at the present day of this rule about the order of precedence.—*Namasevayam Pillay* v. *Annammai Ummal* (1869) 4 M. H. C.R. 339.—ED.]

[6. The rule stated here apparently applies to all castes; certainly to the first three, and hence it cannot be inferred from the language that a marriage may take place even after menses. It is not consistent with the rules of Sanskrit interpretation to infer affirmatively that an act may be done from the fact that it is stated to be sinful. It is also not legitimate to infer from the statement that "this must be explained as referring to cases where a bridegroom of the description given before is obtainable" that an exception is admitted to the rule, and that hence a marriage may be performed after menses if a suitable match is not procurable. All that the passage means is that the rule that the persons stated in the text should give the bride in marriage does not enable the guardian or other giver to give a girl in marriage to an ineligible suitor under the circumstances. Apararka quotes various texts from Kasyapa and Samvarta showing that the marriage of a maiden of the Brahmin caste after menses is

shall choose an eligible bridegroom *i.e.*, one who deserves to be resorted to, *i.e.*, who possessses, the abovementioned qualifications.[1]

65. Once is a maiden given. One taking her away is punishable as a thief. Even a maiden once given, he (the giver) may take away, if a suitor better than the previous one is procurable.

The ordinance (precept) of the *Sastra* is that a maiden is is given only once. Therefore he who takes her away after giving her, is punishable like a thief. There being thus a general prohibition, the author cites an exception. If a suitor better than the first, *i.e.*, possessing superiority in learning, birth, &c., arrives, (is available) or if the first suitor is guilty of *pâtaka* (degrading sin) or bad conduct, he (the giver) may take away a maiden though already given. And this must be understood to be before the seventh step (in marriage).[2]

66. He who gives a maiden without mentioning blemishes[3] is punishable with (the punishment of) Uttama-Sahasa[4] (the highest fine); so also one who abandons a woman without blemish. And one falsely defaming (her) is punishable with (a fine of) hundred (panams).

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sinful. He cites a text of Kasyapa which shows that a Brahmin marrying such a wife by folly is under certain disabilities, *viz.*, that he is not fit for Sraddha and for company in mess. The text of Samvarta shows that a mother, a father and an elder brother who see a maiden in menses go to hell. Further, where the texts inculcate a duty that a worthy bridegroom should be procured, any statement made that the girl should rather stop in the father's house than that he should give her to an unworthy suitor (see Manu IX, § 89) is only intended to give greater prominence to the duty. No inference can be made that the father's duty need not be discharged.

[1. According to Apararka this must be before puberty. On questions of Hindu Law (and marriage is one) it is not necessary to inquire as to the right interpretation which one may be inclined to deduce from a reading of Yajnavalkya's text unfettered by any interpretation placed by commentators upon that smrithi as the interpretation placed by the commentators has to be accepted in preference to one's own interpretations especially when the former is supported by usage. For the authority to be ascribed to commentators, see *The Collector of Madura* v. *Muthu Ramalinga Setupati*. (1868) 12 M. I. A. 397 at p. 436 :—ED.]

2. [According to the Hindu Law the Saptapathi fixes irrevocably the relationship arising by marriage. The marriage becomes complete and irrevocable. See Manu VIII, § 227. Sacred Books Vol. XXV, p. 295 ; and Mayne's Hindu Law, para 95 (7th Edn.) pp. 116, 118 :—ED.]

3. According to Apararka the reading is different. According to him the defect must be one not visible to the bridegroom but known to the giver : this seems to convey better sense than the Mitakshara. According to Narada, the defects contemplated are chronic diseases ; defective organs ; having been enjoyed by another ; being forward or shameless ; love of another :—ED.]

4. See Yajnavalkya Âchâra-kanda, § 365, 366 : Mandlik, p. 200. Uttama-Sâhasa is 1080 panams.

He who gives a maiden without disclosing a defect or perceptible to the sight visible is punishable with the Uttama-Sahâsa. Uttama-Sâhasa will be described hereafter.[1] One abandoning a woman without defect, after marrying her, is punishable with the very (punishment of) Uttama-Sâhasa. But one who just before marriage, defames a maiden from hatred or otherwise, by (imputing to her) non-existent defects such as chronic disease, &c., is punishable with hundred panams which will be described hereafter.

In the passage "one who has not been owned by any other before[2]" a maiden who has not been enjoyed before (Anya-Pûrva) has been declared fit for marriage. The author now describes who the Anya-Pûrva (one owned, i. e., married before) there referred to is.

67. A Punarbhu is one who has again undergone the sacrament (of marriage) and is either a Kshata or an Akshata. [• 148] **•A Swairini is one who, leaving her husband, joins another of the same caste out of love.**

An *Anyâ-Pûrva* is of two kinds, *Punarbhu* and *Swairini.* A *Punarbhu*[3] again is of two kinds, *Kshata* and *Akshata.* A *Kshata* is one who even before the *Samskâra* (*i. e.*, the sacrament of marriage) has been defiled by intercourse with a man, while an *Akshata* (*Punarbhu*) is one who has been blemished by again performing the second sacrament (of marriage). Further, a *Swairini* is one who leaving a young[4] (*i. e.*, first) husband joins a man of the same caste from love.

The author states an exception to the applicability in these several ways of the prohibitive rule about a woman who has been owned by another.

68. The husband's brother, a sapinda, or a sagotra permitted by the elders desirous of progeny, may approach a sonless woman in season (*Ritu*) with his body anointed with ghee.

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1. See page 115 note (4).

2. Yâjñavalkya § 52, p. 73, supra.

3. *Ibid*, Vyavahara Adhyaya § 130. The mark of a Punarbhû is the quality of again marrying (Aparârka). So Aparârka points out that a woman who leaves her first husband and afterwards joins him is a Punarbhû. See Manu Chap. IX, § 176. Sacred Books, Vol. XXV, p. 363.

4. Another reading is कौमारेपतिम् i. e., "in youth, her husband.'

69. He may approach her only till conception; otherwise he becomes degraded. The son born under this rule is his (the first husband's) Kshetraja son.

Permitted by the father and others to raise up issue a *Devara*, *i.e.*, the younger[1] brother of the husband, or a *sapinda*, of the above description[2] or a *sagotra*—among these in the absence of each prior person, each subsequent person—with his whole body anointed with ghee, and only in season to be specified hereafter, may approach, "a sonless woman" or one who has got no sons, *i.e.*, have intercourse till conception. But resorting to her after that time or in other modes, (than those prescribed) he becomes degraded. The son begotten by virtue of this precept becomes a *Kshetraja* son of the first husband. And *Acharyas* or preceptors have held this to refer to a girl who has been betrothed. Since Manu has declared:[3] "The husband's younger brother (the brother-in-law) may marry according to this (the following) rule the maiden whose husband may die after betrothal."

The author speaks of an adulteress.

70. He shall cause an adulterous wife to live (in his house) deprived of all power, squalid, living on a bare mouthful (lump) of food, disgraced, and sleeping on the floor.

*("An adulterous wife") *i.e.*, Her, who goes astray. "Deprived of power", *i.e.*, deprived of the power of maintaining servants, &c. "Squalid", *i.e.*, destitute of collyrium for the eyes, anointment of the body, bright cloths and ornaments. "Living (dependent) on a bare mouthful of food" *i.e.*, having just enough food to keep body and soul together. "Disgraced" *i.e.*, by insults, and lying on the bare ground. He shall cause her to live in his own house only. This is intended to bring about the subjugation of desires, and not for the purpose of purifying her, as expiation is separately described[4] "he shall make her fulfil the same observance as is prescribed for a man who has intercourse with others' wives."[5] [* 149]

1. The younger or the elder according to Apararka.

2. See pp. 73 to 78 *supra*.

3. Manu IX, § 69, Sacred Books, Vol. XXV, p. 339.

4. Manu XI, § 177. Sacred Books, Vol. XXV p. 467.

5. After the purification prescribed in the above text, the woman should be taken by the husband according to Apararka who cites a text of Manu, according to which those who have performed the purificatory ceremonies ought not to be disrespected.

For the purpose of prescribing a light expiation for her the author states the following eulogium, (explanation[1]).

71. The Moon endowed these (women) with cleanliness, Gandharva[2] with sweet speech, and the God of Fire with perfect purity; therefore, women are certainly pure.

Before marriage, the *Moon, Gandharva,* and *the God of Fire,* having enjoyed[3] women, conferred on them respectively cleanliness[4], sweet speech and perfect purity[5]. Hence women have been considered pure, *i.e.,* free from blemish *i.e.,* or clean in all things as regards touch, embrace, etc.[5]

But the author says it must not be doubted (or assumed) that no blame then attaches to her.

72. Purification from adultery is at (the occurrence of) menses.[6] On pregnancy, abandonment is prescribed[7]. (So also) in case of murder (or killing) of the fœtus and husband and the like and also in the case of a maha-pataka.

Purification from that sin which arises from unmanifested (*i.e.,* not outwardly manifested in action) *adulterous thoughts, i.e.,* from the mental determination or desire of sexual intercourse with another person is (effected) on the appearance of menses. Abandonment, on pregnancy caused by a Sudra. As it is declared in the Smriti[8] : "The wives of Brahmins, Kshatriyas, and Vaisyas having had intercourse with a Sudra are purified by expiation, if they have not borne children, but not others." Similarly, abandonment in case of fœticide, murder of the husband, *maha-pâtaka,* such as murder of a Brahmin (and the like). From the use of the word *âdi,* (and the like) abandonment in case of intercourse with a

1. *i. e.,* the author gives the explanation (of the purpose) for prescribing a light expiation.

2. Visvavasu. The Gandharva referred to here is the king of Gandharvas.

3. *i. e.,* taken them under their protection.

4. Purity (Aparарka.)

5. Fitness for all Yajnas (Sacrifices) :—Aparарka

6. Aparарka takes the reading व्यभिचारे ऋतौ शुद्धिः (*Vyabhichâre Ritau Suddih.*) His explanation is that expiation should be performed on or after the appearance of menses. Apparently he does not accept the suggestion of the Mitakshara that the purification is merely for the sin arising from adulterous thoughts.

7. If she becomes pregnant (by adultery) only abandonment is prescribed and no expiation.

8. Vasishta XXI § 12. Sacred Books, Vol. XIV, p. 112.

pupil (of the husband) &c., also (is prescribed) as it is laid down in Vyasa Smriti[1]: "four should be abandoned, she who has intercourse * with a pupil, or a *Guru* (or preceptor), and especially she [* 150] who kills her husband, and she who cohabits with a *Jungita.*" *Jungita* is one born in the inverse order of castes such as leather workers and the like. Abandonment is for purposes of enjoyment and religious acts and not for her expulsion from the house, on account of the rule (or precept). "He shall confine her in the same house."[2]

The author mentions the causes for a second marriage.

73. A woman who is a drunkard, diseased, knavish, barren, wasteful (or extravagant) rude (or given to disagreeable speech), or bringing forth only daughter, should be superseded (*lit.* is a wife in addition to whom it is proper to marry another); so also one who hates her husband.[3]

A drunkard, *i.e.*, one who drinks liquor[4], including even a Sudra woman since the prohibition is general that "one-half of his body is degraded whose wife drinks liquor."[3] *Vyâdhithâ* (diseased) *i.e.*, becomes afflicted with chronic disease. *Dhurtha*, *i.e.*, knavish, *Vandhya*, *i.e.*, barren. *Arthagni*, *i.e.*, destroying or wasting property. *Apriyamvada*, *i.e.*, one who speaks bitterly. Striprasûh *i.e.*, producing daughters. *Purushadhveshini*, *i.e.*, doing what is prejudicial to him in all acts. The expression "deserves to be superseded" *Âdhivethavyâ* (*i.e.*,) has to be connected with each expression separately. Supersession means the marrying of another wife.

74. As for a superseded wife (she) must be maintained, otherwise, great sin will result. Where there is harmony between the husband and wife, there, the three ends[5] (or pursuits) of life flourish.

Moreover, she, the superseded wife is maintainable even as before with gifts, respect (or marks of honor) and hospitality. Otherwise, in default of maintaining, great sin and the punishment to be mentioned (will result). When she is maintained there

1. This passage is not to be found in the Vyasa Smriti contained in the collection of Smritis published at Calcutta or Bombay. Apararka takes it as the text of Vasishta. See Vasishta § 10. Sacred Books Vol. XIV, pp. 111, 112.

2. [Manu Chap. XI § 177 (Calcutta Edition).—§ 176 according to the Bombay edition.) Sacred Books, Vol. XXV, p. 467 :—ED.]

3. Cf. Manu IX § 80. Sacred Books, Vol. XXV, pp. 341, 342.

4. This is confined according to Apararka to intoxicating drugs and drinks as contradistinguished from (*Sare*, wine)—see Manu.

5. [Dharma, pleasure (Kâma) and wealth (Arthâ, according to some utility) :—ED.]

is not merely an immunity from sin. Because where between the husband and wife, harmony, *i.e.*, unanimity (obtains) there is a daily increase of Dharma (virtue), wealth and pleasure.

The author speaks about women.

75. She who does not resort to another, whether her husband is dead or living, obtains fame here (in this world) and rejoices with Uma (in the world to come).

She who, whether her husband is living or dead, does not
[* 151] resort to another from * fickleness[1] obtains a wide fame here, *i. e.*, in this world and sports with *Uma* by force of her virtue in the other world.

The author now speaks about one who supersedes his wife in the absence of (proper) causes for supersession.

76. A man forsaking a wife who is obedient (submissive), clever, the mother of male children (*lit.* brave sons) and speaking affectionately should be made to give the third part (of his wealth) to her and if a pauper (should be made to give) her maintenance.

Obedient, *i. e.*, carrying out his orders. Clever, *i. e.*, quick in action (or acting expeditiously). (वीरसू T mother of, male children) *i. e.*, one having sons. Speaking affectionately, *i. e.*, sweet-speaking. He who forsakes, *i. e.*, marries in addition to (such a wife) should be compelled by the King to part with a third of his wealth (to her). But if he has no wealth he should be compelled to give maintenance, *i. e.*, food and raiment, etc.

The author mentions the duties of women.

77. By women, the husband's word should be obeyed. This is the highest duty (virtue) of women. A husband guilty of a mahapathaka should be awaited till purification.

The husband's word should always be obeyed by women, because this is the highest duty of women, being the means of (reaching) Heaven. When, however, the husband is guilty of a *mahâpâthaka*, his purification should be awaited[2]. No subser-

1. [The meaning is clear although necessarily the translation is ambiguous. It is only intended to convey the idea that fickleness is the cause. The Sanskrit word *châpalya* (fickleness) is connected with *upagacchati* (resorts) :—ED.]

2. Aparaka confines this to the case of a husband guilty of a mahapathaka incurred after marriage. He also adds that in the case of a husband guilty of a mahapathaka incurred before marriage, the marriage itself is void and that the woman need not await his purification.

vience to him. But after purification, dependence on him as before.

The author speaks of the fruits of a marriage conformable to the Sastras (or sacred institutes).

78. Since perpetuation of line and attainment of Heaven are (effected) by sons, grandsons and great-grandsons, therefore, women should be waited on and kept well protected.

लोकानन्त्य (*lit*, eternity of world or people), *i.e.*, perpetuation (continuity) of line (race) and the attainment of heaven are the objects of marriage. How ? He (the author) says, that the connection is (*i.e.*, it must be understood) that perpetuation of line (is effected) by sons, grandsons and great-grandsons, and by the attainment of heaven by *agnihotra and the like.* Since both these two (benefits) accrue from women, therefore, women should be used, *i.e.*, enjoyed for the sake of offspring. They must also be protected for religious purposes. So it has been said by Apastamba* that the object of marriage is the production of *dharma* and offspring as when he says that a man shall not take another wife, while he has a wife rich in *dharma* and children. The fruition of the sexual desire is, however, only secular.

CRITICAL NOTES. * [* 152]

Iyyappa *v*. Rama Lakshmamma.—I. L. R. 13 M. 549 ; **Narayanasamy *v*. Ramasawmy**, 1. M. L. J. 39 ; S. C. I.L.R. 14. M. 172.

Inconsistent claims and defences.—Since the decision of the Judicial Committee of the Privy Council in *Mahomed Buksh Khan* v. *Hossein Bibi*,[1] the question of the right of parties to combine inconsistent claims or defences has much engaged the attention of the profession, and has been raised for decision in several cases of late. Two of these we have taken up as the subject of this note. In the case before the Privy Council, the plaintiff, a purda-nashin lady, sued to recover possession of certain property, on the ground that a deed of gift of the property, purporting to be executed by her, was a forged document. The important issue in the case was, whether the *hibbanamah* on behalf of Shazada Bibi was genuine and valid, and executed with her knowledge and consent, or whether it was executed under

* Apastamba Dharma Sutra, Prasna II, Patala 6, Sutra 12. Sacred Books, Vol.

1. (1888) L. R. 15 I. A. 81 ; s. c. I. L. R. 15 C. 684.

undue influence." The High Court of Calcutta set aside the deed on the ground of undue influence. On appeal their Lordships of the Privy Council held that the latter part of the issue referred to ought not to have been framed. It was, they said, "absolutely inconsistent with the case made by the plaintiff. It only becomes possible on the assumption that the alleged cause of action is unfounded." This is the passage which has subsequently been held as supporting the proposition that inconsistent claims and defences cannot be combined. It is difficult to hold that the observations of the Privy Council really support this view. All that their Lordships said was that the issue was inconsistent with the cause of action alleged in the plaint. It is almost clear that a Court ought not to frame an issue inconsistent with the case with which the plaintiff comes into court. But the Privy Council do not lay down that a plaintiff cannot combine, *in his plaint*, alternatively against the same defendant or defendants, claims or causes of action which are inconsistent with each other.[1] Their Lordships did as a fact go into the question of undue influence, and holding that it was not proved, reversed the decision of the High Court.[2] *Iyappa* v. *Rama Lakshmamma*,[3] was a suit for cancellation of a document alleged to have been "fraudulently concocted by defendant in respect of certain property." The Court treated the suit as one based really on the ground that the document was a forged one and said, "it was not competent to the plaintiff to combine with this charge, as an alternative, the absolutely inconsistent charge, that if she did execute the document, no consideration was received by her, or that fraud was practised upon her," and they rely on the Privy Council case as supporting this view. The decision, however, was expressly based on the ground that the plaintiff had no cause of action, as he had, previously to the suit, parted with his interest in the plaint property.[4] We shall presently consider whether the allegation

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1. At to alternative claims, see *Butchanna* v. *Varahalu* (1901) I. L. R. 24 M. 408; *Durgamani* v. *Ambica Charan* (1906) 4 C. L. J. 367 ;and *Narendra Nath* v. *Abhaya Charan* (1906) 4 C. L. J. 437 ; 5 C.W. N. 700.

[2. In *Dduga Buksh* v. *Mirza Mahammed* (1904) I. L. R. 27 A. I ; s. c. L. R. 31 I. A. 235 the questions of undue influence and want of consideration were raised and decided by the Judicial Committee.—ED.]

3. (1890) I. L. R. 13 M. 549.

4. [See the remarks of the Bombay High Court upon this part of the case in *Kotrabassappaya* v. *Chenvirappaya* (1898) I. L. R.23 B. 375, (380) ;—ED.]

of want of consideration is really inconsistent with the one of non-execution of the document by the plaintiff. But the High Court do not seem to be quite right in treating the observation of the Judicial Committee as meaning that inconsistent claims cannot be combined in the same suit. In *Narayanasamy* v. *Ramasawmy*,[1] which was a *suit by an adopted son to recover the property left by his adoptive father, the defendant, his widow, contended that the alleged adoption did not really take place, and pleaded, in appeal, in the alternative, that if it did, the deed of adoption admitted by the plaintiff contained a bequest of a portion of the property sued for, in her favor. The Vakil for the plaintiff (appellant) contended in the High Court that the two pleas were inconsistent, and the defendant therefore could not set up both together. Their Lordships (*Shephard* and *Best*, JJ.) accepted the argument, that the pleas were, in fact, inconsistent, and were apparently also of opinion that a plaintiff could not combine two inconsistent claims,[2] but held that the Privy Council case had no application to the case before them, because, 1st, the facts pleaded were not necessarily or properly within the knowledge of the defendant; 2ndly, because the rule (supposed to be) laid down by the Privy Council would not apply to a defendant[3], as he could not set up in another action pleas not set up in the present action, while "it is open to a plaintiff under certain circumstances to reserve a ground of claim."—In S. A. No. 1699 of 1888 (M. H. C.) the rule was applied to the defendant, and it was held that in a suit on a bond he could not set up the pleas of denial of execution and want of consideration together. [* 153]

It is submitted that the construction put by the High Court on the remarks of the Privy Council is not strictly warranted by those remarks, and was possibly due to the questionable head-note of the reporter in the Privy Council case. As the subject is of considerable practical importance, it may not be out of place to see what authority there is for the rule supposed to have been laid down in the case of *Mahomed Buksh Khan* v. *Hossein Bibi*,[4] independently of that case itself. The learning on the subject is too voluminous to be digested within the compass of a note, and

1. (1890) I. L. R. 14 M. 172; s. c. I M. L. J. 39.

2. This was also the view taken by the Bombay High Court. See *Raghavji Vizpal* v. *Narandas* (1906) Bom. L. R. 921 (928).

3. (1888) L. R. 15 I. A. 81; s. c. L. R. 15 C. 684.

4. (1888) L. R. 15 I. A. 81; s. c. I. L. R. 15 C. 684.

we can only state what appear to us to be the results of the cases on the subject. In England, under the strict rules of the old times, inconsistent claims and defences were alike bad, (see Stephen on Pleading, Ed. 1866, pp. 335 and 336), and the result was, that in the case of inconsistent claims, the plaintiff's action was dismissed—*Hart* v. *Longfield*[1]—and in the case of inconsistent defences, a decree was given to the plaintiff at once, (see *Jesus College* v. *Gibbs*[2]) unless "the second allegation which creates any repugnancy is merely superfluous and redundant, so that it may be rejected from the pleading without materially altering the general sense and effect," in which case it was rejected as surplusage. See also Story's Equity Pleadings, p. 225. Under the Statute of 4 Anne Ch. 16, S. 4, a defendant was at liberty to plead, *with the leave of the Court*, 'as many several matters as he should think necessary for his defence,' but so far as we can judge from the reports, if the Court thought the pleas absolutely inconsistent, leave was not generally given—see *Jesus College* v. *Gibbs.*[2] The reason of the rule is thus laid down : " The fact that a defendant is obliged to swear to the truth of his answer would, of itself, necessarily exclude inconsistent statements, for how could a defendant be permitted to attest by his own oath, the truth of two statements wholly irreconcilable with each other." Under the Common Law Procedure Act 1852, S. 84, certain specified pleas
[*154] might be pleaded together **without leave.* The Judicature Act of 1873 finally swept away the old forms of pleading, and since then, it has been open to a defendant to raise as many distinct and separate defences as he may think proper. This has always been held to extend to defences which are inconsistent. In *Spurr* v. *Hill*,[3] *Field* J. observed that since the statute 4 Anne inconsistent pleas have always been allowed. But the correctness of this observation is open to question, in so far as it relates to the period before the Judicature Act, having regard especially to the case already referred to[2], *Field*, J. held further that the plea of payment into Court could not be allowed in a suit for damages, when the plaintiff's title was denied by the defendant, and that it was an exception to the rule, that inconsistent pleas might be raised. The existence of the exception genetally was denied, and the

1. (Hilary term Queen Anne) 7 Mod 148; 2. (1835) 1 Y & C. 145.
3. (1877) 2 Q. B. D. 615.

decision in *Spurr* v. *Hill* [1] questioned, by the Court of Appeal in *Berdan* v. *Greenwood.*[2] *Thesiger*, L. J. in his judgment (p. 253), lays down the rule that the defendant may raise distinct and separate and inconsistent pleas under the Judicature Act. In fact in England, "A Court has no power to strike out any pleadings, unless it be scandalous, or tend to embarrass, prejudice, or delay the fair trial of the case." Daniel's Chancery Practice, Ed. 1882, p. 400. Provided the defences are clear and distinct, so as to give notice to the plaintiff of the real contentions of the defendant, and they are not scandalous, they are good, however inconsistent they may be. With respect to the combination of inconsistent *claims* by a *plaintiff*, we find that after the Judicature Act at any rate, it has been permitted; however, a plaintiff is sometimes not allowed, by way of *reply*, to set up a plea inconsistent with the case in the *plaint*, but the Court does not disallow even this, where the whole case can be fairly tried. In *Hall* v. *Eve*[3], the plaintiff sued for specific performance, the defendant pleaded that he was not entitled to it, as he was guilty of a breach of the agreement; plaintiff, in reply, denied the facts alleged by the defendant, and contended that, even if they were true, the breach was caused by the defendant's own inducement. The reply was objected to on the ground of inconsistency. On the plaintiff's right to raise the pleas, *James*, L. J. observed, "It is not questioned that a plaintiff ought to be at liberty to do so, if it is true.The only question is whether he is wrong in alleging it by a *special reply*." In *Foulkes* v. *Davies*,[4] plaintiff sued to set aside a deed on the ground of fraud, and in the alternative for a declaration that she was entitled to the property under an appointment by her under the powers conferred by the deed ; she was held to be within her rights in combining the two claims. [The English Practice is thus stated in Snow's Annual Practice (for 1907 Vol. 1 p. 229.) " There is nothing to prevent either party from setting up two or more inconsistent sets of material facts and claiming relief thereunder in the altenative. A plaintiff may rely upon several different rights alternatively though they may be inconsistent. So a defendant may raise, by his statement of defence,without leave, as many distinct and separate, and, therefore, inconsistent defences as he may think proper," :—Ed.]

1. (1887) 2 Q. B. D. 615.
2. (1878) L. R. 3 Ex. D. 251.
3. (1876) 4 Ch. D. 341.
4. (1868) L. R. 7 Eq. 42.

Turning now to the Indian Law, there are a few cases reported in Sutherland's *Weekly Reporter*. In *Bejoy Keshub Roy* v. *Obhoy Churn Ghose*[1] it was held that a claim to hold a *hat* could not be claimed, alternatively, as owner of the ground on which the *hat* was held, and by prescriptive right to hold the *hat* at the place on the ground that the bases of the right were inconsistent. *Macpherson*, J. went the length of observing that the plaintiff ought not to have been allowed to go on with his case until he had
[*155] put on *record a formal and complete abandonment of one of the claims.[2] In *Woodit Singh* v. *Baldeo Sing*[3] and *Ameer-un-nissa Bibee* v. *Woomaroodden Mahomed Chowdhry*,[4] the same principle was assumed, but the Court decided that the allegations made by the plaintiffs in these cases were not really inconsistent with each other. There is no rule in the Code of Civil Procedure prohibiting inconsistent allegations being made by plaintiff or defendant. The English law and practice are in favour of allowing them. As pointed out by the learned judges who decided *Narayanasamy* v. *Ramasawmy*,[5] if inconsistent defences are disallowed, the defendant cannot set up the disallowed defences in another suit. Very often the defences raised by a defendant are only in part within his own knowledge, and are to a large extent the result of inquiry and inference. It is hard to call upon him to determine which plea he will stand upon. He may be mistaken in his inquiry or inference, and even where he is right, it is by no means certain that the Court will agree with him. It is fair, therefore, that he should be at liberty to raise all available defences for adjudication by the Court. The correctness of the suggestion that the rule may apply only where the facts are necessarily within the party's knowledge

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1. (1871) 16 W. R. C.R. 198. In *Narandra Nath* v. *Abhaya Charan* (1906) 4 C. L. J. 437 it was held that rights of ownership and easement may be claimed by a plaintiff in the alternative.

[2. This can hardly be regarded as good law at the present day. The Privy Council have held that 'where a person sues on title and the evidence shews prescriptive title, he is entitled to a decree upon such title though he has not pleaded prescription.' See *Vasudeva Padhi* v. *Maguni Devan* (1901) I. L. R. 24 M. 387 (1872) See also *Durgamani* v. *Ambica Charan* (1906) 4 C. L. J. 367 :—ED.]

3. (1873) 21 W. R. C. R. 12.

4. (1870) 14 W. R. C. R. 49 [followed in *Syed Wajed Hossein* v. *Hafey Ahmed Razah* (1872) 17 W. R. C. 480 :—ED.]

5. (1890) I. L. R. 14 M. 172.

is open to question [1]. For if a party is bound to be consistent, his ignorance can be no excuse, because it is his duty to inquire and find out the truth in his own case, and the rule of consistent pleadings is not based on the obligation to inform the Court of what the defendant knows personally. Besides, it is often difficult to say whether a fact is within the knowledge of the defendant, inasmuch as many things are the result partly of knowledge and partly of inference, and the knowledge and inference are often inextricably mixed up together. Moreover, it is sometimes extremely difficult to decide whether the pleas are really inconsistent. Take, for instance, a case where a defendant denies the execution of a bond and receipt of consideration for it. These were held to be inconsistent in *Iyyappa* v. *Ramalakshmamma*[2] and in S. A. No. 1699 of 1888. But this is by no means clear. [In *Jino* v. *Manon*[3] the Allahabad High Court, while not in any way denying the pleas to be inconsistent, held that a Court had no right to dismiss a suit so framed. The suit in that case was by the plaintiff to declare a certain mortgage bond alleged to have been executed by him to the defendant was a forgery or if the Court should find otherwise that it was void for want of consideration :—Ed.] The test is, whether if the defendant had to prove his second plea, the fact denied by his first plea would have to be availed of by him as a step in the chain of facts. Now in proving non-payment of consideration for a loan evidenced by a bond, the defendant need not and does not rely on the fact of execution. The fact will be proved without any reference whatever to his having signed the bond or not. In *Woodit Singh* v. *Baldeo Singh*,[4] plaintiff sued for the recovery of certain lands on hereditary *gohashtah* right, and in the alternative, on having occupied the land for more than 12 years. The two were held not to be inconsistent. [So a claim by a plaintiff that he is entitled as owner to a certain land or if that is found against that he has certain rights of way over it[5]. So also a claim of ownership by

1. But see *Narayanasami* v. *Ramasami* (1890) I. L. R. 14 M. 172 ; *Raghavji Vizpal* v. *Narandas Paramanandas* (1906) 8 Bom. L. R. 921 (928) where it was stated that inconsistent defences might be allowed in the case of a defendant who was not a party to the transaction and had no knowledge of it :—Ed.]

2. (1890) I. L. R. 13 M. 549.

3. (1895) I. L. R. 18 A. 125.

4. (1873) 21 W. R. C. R. 12.

5. *Durgamani* v. *Ambica Charan* (1906) 4 C. L. J. 367 (376) and *Narendra Nath* v. *Abhaya Charan* (1906) 4 C. L. J. 437.

virtue of title in fact or of title in law, *i. e.*, prescriptive title[1]:—ED.] Undue influence in executing a document, on the other hand, is absolutely inconsistent with non-execution just as much as part payment[1] is. It is to be remembered that the rule is not necessary in the interests of justice. If any of the pleas is false to the knowledge of the defendant, he can be punished for it under the criminal law; on the other hand, the fact that one of the defences is false is hardly a good ground for depriving the defendant of a true one. The Civil Courts have only to adjudicate on the civil rights of the parties, and any offence against justice can be adequately punished by the criminal law. The Procedure
[* 156] Code itself does not* give the Court even the power to strike out a plea on the ground that it is calculated to embarrass or delay, though it was framed after the Judicature Act was passed. In respect to inconsistent *claims* by the plaintiff, the same rule, it is submitted, will apply.[2] There can be no good ground for applying one rule to the defendant, and one to the plaintiff. [In *Perumal* v. *Kavari*,[3] *Best* J. has held that it is open to a plaintiff who is not a party to the transaction in respect of which the allegations are made to come into court seeking relief in the alternative dependent upon what may be found by the Court to be the true facts of the case in the same way as it is open to a defendant who is a stranger to the transaction to raise inconsistent pleas as to matters not necessarily or properly within his knowledge. But in *Raghavji Vizpal* v. *Narandas*[4] it was held by the Bombay High Court that the general rule was that a plaintiff ought not to be allowed to set up inconsistent cases or pleas. But a defendant may be allowed to make an alternative case at the hearing under special circumstances. In an earlier case before the Bombay High Court, *Ningappa* v. *Shivappa*[5] it was observed; "It has been accordingly ruled that inconsistent assertions of fact cannot be permitted either in the plaint or in the pleadings, but that on the same basis of facts two distinct titles may be put forth—ED.] If the Court thinks that the combination of the claims is likely to hamper the trial of the case, it can, of course, order separate trials,

1. Cf. in *Durga Buksh* v. *Mirza Muhammed* (1904) I. L. R. 27 A. 1.

2. See as to a mortgagor in a redemption suit bringing alternative claims *Butchanna* v. *Varahalu* (1901) I. L. R. 24 M. 408.

3. (1892) I. L. R. 16 M. 121 (124)

4. (1906) 8 Bom. L. R. 921.

5. (1894) I. L. R. 19 B. 323 (327, 329).

and this will obviate all practical difficulties. It cannot be required that the plaintiff should altogether abandon one of the claims as was apparently considered by *Macpherson* J. in the case of *Bijoy Keshub Roy* v. *Obhoy Churn.*[1] If inconsistent defences are held to be not allowable, the proper course will be to make the defendant amend his defence and elect between the inconsistent pleas, and not to decree the plaintiff's claim on the ground of the defendant's inconsistency, as laid down in *Jesus College* v. *Gibbs*[2] or to allow the first plea and disallow the second as was apparently held in S. A. No. 1699 of 1888.

Babu Ram *v.* **Ram Dayal**, I. L. R. 12 A. 541.—*Limitation Act, Art.* 89.—In this case, the plaintiffs sued the defendants, their agents, in 1887 for the price of 33 bags of cummin seed. The plaintiffs had consigned to the defendants at different dates in 1881, 152 bags of cummin seed. On the 8th December of that year, the defendants sent an account of the sale of 119 bags; no account was sent to the plaintiffs for the remaining 33 bags, nor was any demanded by the plaintiffs till December 1886, when the demand was refused. The sale of the 33 bags had taken place in January 1882. The defendants pleaded *inter alia* that the suit was barred by limitation, as it was one "by a principal against his agent for movable property received by the latter and not accounted for," and three years had elapsed since the termination of the agency, which they said was in January 1882, when the sale of the 33 bags took place. *Broadhurst* and *Tyrrell* JJ. who heard the case, held, reversing the decision of the lower Courts, that the suit was not barred.[3] It was common ground for both parties that Art. 89 of the Limitation Act applied and the period of limitation was 3 years from the termination of the agency, or if the agency did not terminate, 3 years from the date of demand by the plaintiffs and defendant's refusal (*i.e.* December 1886). If it was the latter, the suit was clearly within time. The question, therefore, was whether the agency terminated when the sale of the 33 bags took place in January 1882. Their Lordships held it did not, because the business of the agency for sale could terminate only when the agent had accounted to the principal for the sale proceeds, and relied on S. 218 of the Contract Act which

1. (1871) 16 W. R. 198. 2. (1835) 1 Y. & C. 145.

3. [This decision was followed by Mr. Justice *Stanley* in *Fink* v. *Buldeo Dass* (1899) I. L. R. 26 C. 715 at 724, 725.:—ED.]

provides that an agent is bound to pay to his principal all sums received on his account. Now there can be no doubt that he is bound to do so. [If no demand for an account is made during the course of the agency, the accounting must take place at the termination of the agency and that is the latest starting point. When the agency terminates will depend upon the facts and circumstances. But is that (*viz.*, accounting) a portion of the business of the *agency* on termination of which there is a revocation of authority under S. 201 of the Contract Act?—ED.] This expression would seem *prima facie* to mean only the business which the agent is charged to do as representing, and on behalf of, his principal, because " an agent is a person employed to do any act for another, or to represent another in dealing *with third parties*." The agent's duty to account to his principal is [*157] exactly similar to the duty of * any one else in possession of the property of another to account, and has nothing to do with his representation of the principal. This construction is to some extent borne out by Art. 84 of the Limitation Act, which provides that in suits by an attorney or vakil for his costs of a suit or a particular business, when there is no express agreement as to the time when such costs are to be paid, limitation begins to run from the termination of the suit or business (see p. 26 DARBY and BOSANQUET on Limitation. Ed. 1867.). The position of an attorney or vakil is analogous to that of an agent, and the Legislature may reasonably be supposed to have fixed the termination of the business of the agency as the starting point for limitation, in suits by them for costs due to them for work done as agent. The Legislature, therefore, apparently considers the business of the agency finished when the work which the agent has to do *for the principal* is completed. STORY writes to the same effect in his work on Agency. He says that if the principal authorises his agent to sell a particular ship and the agent makes a complete sale of it, the agency is *functus officio*, and, therefore, has its natural termination (p. 625, Ninth Edition). In America, time runs only from the date of demand for an account, and not from the termination of the agency. See ANGELL on Limitation, p. 177.

Radha Shyam Sircar v. Joy Ram Senapati.—I. L. R. 17 C. 896.—In this case the Calcutta High Court held that an

alienation by a Hindu widow, with the consent of *some* of the *immediate* reversioners who survived her,of a portion of her husband's property, is not valid, against subsequent transferees from the consenting reversioners of the same property, after the widow's death. The question of the validity of an alienation of the husband's estate by a Hindu widow has been the subject of much discussion.[1] By a long course of decisions, the Calcutta High Court first arrived at the result that an alienation by a Hindu widow in favour of the then next reversioner was a renunciation of her estate, which let him into possession as the next heir to the property of her husband. And this result was upheld, notwithstanding the fact that the next reversioner at the time of the death of the widow happened to be a different person from the one in whose favour the alienation, or renunciation as it is called, was made. From this, the conclusion naturally and logically followed that, if instead of the alienation being to the then reversioner, it was made by the widow either jointly with him, or with his consent, in favour of a third person, such alienation was valid against the actual reversioner at her death. For, if an alienation in favour of the presumptive reversioner was valid, and he could validly dispose of the property to the third person,the same transaction could be effectuated by the widow and presumptive reversioner joining in one conveyance to the third person or by the widow executing it with his consent.— *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy.*[2] But a Full Bench of the Allahabad High Court in *Ramphal Rai* v. *Tulakuari*[3] repudiates both the

[1. The subject has been discussed in an article in 7 M. L. J. p. 14 and we propose merely to note here the later (F. B.) cases :—ED.]

2. (1884) I. L. R. 10 C. 1102 :—See also *Lala Parbhu Lal* v. *Mylne* (1887) I. L. R. 14 C. 401 (418). The principle laid down in the Full Bench case was reaffirmed in *Hem Chunder* v. *Sarnamoyi* (1894) I. L. R. 22 C. 354, and it seems now to be the settled law of the Calcutta High Court. See also *Braja Lal* v. *Jiban Krishna* (1893) I. L. R. 26 C. 285 (287) and *Walial Hussan* v. *Maharaj Kumar Gopal* (1902) 6 C. W. N. 905 (908). But a consent of a female reversioner will not do. See *Walial Hussan* v. *Maharaj Kumar Gopal*, *supra*, and *Abinash Chandra* v. *Hari Nath* (1904) I. L. R. 32 C. 62 (66).

3. [(1883) I. L. R. 6 A. 116. We reserve the citation of tht later cases to the article in 7 M. L. J., p. 14 but we shall only cite here the recent case of *Raj Kishore* v. *Durga Charan* (1906) I. L. R. 26 A. 70 ; S. C. 3 A. L. J. 755 which is the latest pronouncement of the law on the subject in Allahabad. We may also refer to the very recent case decided by the Privy Council viz., *Bajrangi Singh* v. *Manokarnika Baksh* (1907) I. L. R. 30 A. 1. The effect of this decision will be considered in the article already referred to. What is the exact view of the Bombay High Court will be considered later when revising the article in 7 M. L. J. p. 14 but it

propositions laid down by the Calcutta High Court and holds that an alienation to the *apparent* reversioner who does not survive her, and an alienation to a stranger with the consent of such reversioner, are alike invalid as against the *actual* reversioner at her death. With regard to the second branch of this rule, the Bombay High Court in *Varjivan Rangji* v. *Ghalji*
[*158] *Gokaldas*[1]* expressed itself in terms, which are in accord with the Allahabad view.[2] The Privy Council have had the question before them in several cases, but not in such a form as to require a clear decision upon the disputed points. Observations have been made by their Lordships which are mere *obiter dicta*, and leave it uncertain what their decision may be when the question sharply arises.[3] In *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*[4] their Lordships said: "It may be taken as established that an alienation by a Hindu widow, which would not otherwise be legitimate, may become so if made with the consent of her husband's *kindred*." Again in *Raj Lukhee Debia* v. *Gokool Chunder*[5] their Lordships say: "They do not mean to impugn the authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such cases must generally be understood to be all those *who are likely to be interested in disputing the transaction*." They also suggest in *Rani Anand Koer* v. *The Court of Wards*[6] that an alienation with the consent of the presumptive reversioner might not be valid. The view thus indicated by the Privy Council is stated by Mr. Mayne in Ss. 591 and 592 of his

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may be stated here that the Bombay view does not in any way accord with the Allahabad view. See *Vinayak* v. *Govind* (1900) I. L. R. 25 B. 120 and *Hunsraj* v. *Bai Moghibai* (1905) 7 Bom. L. R. 622 (633) :—ED.]

1. (1881) I. L. R. 5 B. 563 (571).

[2. Apparently the position in Allahabad is similar to that taken by the Madras High Court in *Marudamuthu* v. *Srinivasa* (1898) I. L. R. 21 M. 128 :—ED.]

3. [The Privy Council have recently decided in *Bajrangi Singh* v. *Manokarnika Baksh Singh* (1907) I. L. R. 30 A. 1 that an alienation by a widow with the consent of the next immediate reversioners is valid and binding upon the actual reversioners. Their Lordships held that ordinarily the consent of the whole body of persons constituting the immediate reversioners at the time should be obtained, though there might be cases in which special circumstances in a particular case may make it unnecessary to obtain the consent of all and that it was enough to obtain the consent even after the transaction :—ED.]

4. (1861) 8 M. I. A. 529 at p. 551.

5. (1869) 13 M. I. A. 209 at p. 228.

6. (1880) L. R. 8 I. A. 14 at p. 23 ; I. L. R. 6 C. 764.

Hindu Law and Usage, and he seems to regard it as probably correct. He holds apparently that to render an alienation by a widow valid, every reversioner then alive, who may become actually entitled to the estate on her death, must have concurred in it. If, therefore, an alienation be made by her with the consent of all the reversioners then existing, it cannot, it would seem, according to him be questioned by a man, who comes into existence afterwards and is actually the next reversioner—see S. 591. Whether this correctly represents the view of the Privy Council or not[1] the matter is involved in such obscurity that an examination of the principles on which a right decision must rest seems to be necessary.

We may first leave out of consideration those cases in which the consent of the reversioner possesses only an evidentiary value as to the existence of a justifying necessity under the Hindu Law. The rest of the cases naturally divide themselves under the two heads we have already adverted to, namely, (1) an alienation or renunciation by the widow in favour of the presumptive reversioner; (2) an alienation by her either in conjunction with him or with his consent in favour of a third person. Now the estate of a Hindu widow in her husband's property has been settled to be a qualified or limited estate. An alienation by the widow of that estate in the whole or a portion of her husband's property to whomsoever made (we omit from consideration all the cases in which a widow is entitled to dispose of the property for justifiable purposes) can only pass *that* estate. The fact that the alienation is made to a person who is the *then* reversioner though ultimately not entitled to the reversion at the widow's death, or the fact that such a person, or a body of such persons, join in the alienation to a stranger, cannot increase the estate of the alienee who takes but the widow's estate. It has been suggested that the widow really abandons or renounces her estate in the property, and that at the moment of such renunciation which is the essence of the transaction, the next heir to the husband becomes seised of the property who, in virtue of his own right, either takes it in the one case,* or passes it on to the stranger in the other. [*159]

[1. The question at the present day is whether the Privy Council decisions in *Behari Lal* v. *Madho Lal* (1891) L. R. 19 I. A. 30 : S. C. I. L. R. 19 C. 236 and *Bajrangi Singh* v. *Manokarnika Baksh Singh* (1907) I. L. R. 30 A. 1 are direct decisions on any of or both the points discussed above and if not what the effect of the two decisions is :—ED.]

We think that the so-called renunciation is but a fiction [1] and while we admit it, it is conceivable, the real character of the transaction is only an alienation of her estate by the widow for consideration. It is difficult to see when such is the essence of the transaction; how the reversionary right can come into being which is contingent on a person surviving her. Assuming, however, the transaction to involve a renunciation on the widow's part, if the legal consequences of such renunciation can be assimilated to those that accrue on her natural or civil death, it is not clear that the presumptive reversioner will at once take the position of the next heir of the husband. The question is, is there any warrant for holding that the theory of inheritance to the estate of a person dying intestate, extends to the case of an owner renouncing or abandoning property, and vests title in the heir immediately on such renunciation ? On the other hand, HOLLAND says (Jurisprudence. p. 174) that any perso nmay acquire title by *occupation* to derelicts which on abandonment cease to belong to their true owners and are *res nullius.* Again JUSTINIAN in his Institutes says (see SANDAR'S Institutes of JUSTINIAN, p. 194) that "anything which is seized on, when abandoned by its owner becomes immediately the property of the person who takes possession of it, and anything is considered as abandoned which its owner has thrown away with a wish no longer to have it as a part of his property, as it therefore immediately ceases to belong to him." SANDARS adds in his note that the thing becomes a *res nullius* by being abandoned and the property of the first occupant by being taken possession of. It follows from the above that renunciation is not tantamount to civil death so as to vest the title in the heir. The renunciation by the widow, if renunciation it be, cannot pass the estate to the presumptive heir, but the widow's estate is all that can be taken by the "occupant," the reversion going to the person next in the order of succession, at her death. If the person renouncing were a full owner, *occupation* must giv eany person the complete title (barring, of course, the right of the estate in certain countries). If it is a life estate or a widow's estate that is renounced, the occupant takes that, liable to be *disseised* on the death of the life tenant or widow (see Arts. 140 and 141, Limitation Act). Again, it is not clear how there can be a partial civil death with reference to one of several items of property, as when

1. Per *Jenkins* C. J. in *Vinayak* v. *Govind* (1900) I. L. R. 25 B. 129 (133).

the renunciation relates merely to that. If the analogy of the law of intestate succession in case of death holds good, the rule that succession at the moment of vesting should either be renounced or kept entirely (See DOMAT'S Civil Law, Rule 2739) would seem to require the letting in of the next-heir, on the termination of the widow's estate on renunciation, with reference to the entire property, and a partial renunciation leading to a partial succession cannot be valid. Illustrations might also be given, if the theory of analogy to natural or civil death be right, of a person becoming liable to be punished for criminal misappropriation if he takes a property abandoned by the owner because the heir would be entitled to it, and under the Hindu Law every Hindu necessarily leaves an heir. But see *Queen-Empress* v. *Bhandu contra.*[1] We, therefore think that the theory of renunciation (even if the transaction* could be treated as such on the part of the widow), [*160] vesting the property in the next heir, is open to grave doubt. If it is a mere alienation on her part we have already seen that it transfers her widow's estate, the reversionary right coming into being on her death. We agree, therefore, with the decision in *Ramphal Rai* v. *Turla Kuari.*[2] As to the decision of the Calcutta High Court under notice which proceeds on the theory of renunciation by the widow, we do not see how it can be supported even on that basis. If that theory is right, and if the next heir would come in on partial renunciation by the widow, it is not clear why the two consenting reversioners could not pass their share in the property to the first purchaser. The second vendees who derived their title from the consenting reversioners would also be estopped from disputing the title of the first vendees who had acted upon such consent.

***W. D. Ryrie v. Shivsankar Gopalji.**—I. L..R. 15 B. 7.— [*186] *Discovery—Affidavit of documents, when there are several plaintiffs —Privilege—C. P. C , S.* 129.—All the plaintiffs in a suit must join in making an affidavit of documents, unless satisfactory reasons are shown for not doing so; residence in England is not a satisfactory reason for not joining in the affidavit. Documents, the purport of interviews with, and advice recieved from, legal advisers, in connection with the matters in suit are privileged; but letters from one of the plaintiffs to another are not

1. (1883) I. L. R. 6 A. 116. 2. (1885) I. L. R. 8 A. 51.

privileged on the ground that they were written after litigation had become imminent, and legal advice had been taken. Opi- [*187] nions or steps taken in reference to a suit, in which plaintiffs* and defendants are putting forward opposite contentions, cannot be said to relate only to the plaintiffs' own case.

In re **Shivappa** *Bin* **Shidlingappa**—I. L. R. 15 B. 11.—*Ss.* 367 *and* 424, *Criminal Procedure Code.*—A judge disposing of a criminal appeal is bound to comply with the provisions of Ss. 367 and 424, Criminal Procedure Code, so as to enable the High Court to satisfy itself whether he has duly considered the evidence in the case.

[See *Kamruddin* v. *Sonatunmandal*[1]; *In the matter of the Petition of Ram Das Maghi*[2]; *Farkan* v. *Soneher Mahomed*[3]; *Girish Mytee* v. *Queen-Empress*[4]; and *Ekcowri Mukerjee* v. *Emperor*[5]. But see *Queen-Empress* v. *Pandeh Bhat.*[6] The High Court however, will not interfere in revision unless the irregularity has occasioned a failure of justice.—*Rohimuddin* v. *Queen-Empress*[7] and *Damu Senapati* v. *Sridhar.*[8] The rule has no application to cases where a Court dismisses an appeal summarily. See *Ras Behari Das* v. *Balgopal*[9]; *Queen-Empress* v. *Warubai*[10]; *Queen-Empress* v. *Nannhu*[11] and *King-Emperor* v. *Krishnayya.*[12] S. 367 has application only to judgments in trials and not to judgments in sanction cases. See *In re Nagappa*[13]:—ED.]

Appaji Bapuji *v.* **Keshav Shamrav**—I. L. R. 15 B 13.—*Construction of "the right, title and interest" of the judgment-debtor, when such judgment debtor is a Hindu father—Effect of enfranchisement of vatan service lands.*—Where, in execution of a money-decree against a Hindu father, family lands were sold, and the sale certificate described the interest sold as the right, title, and interest of the judgment-debtor:—*Held* that the expression may mean either the share which the father would be entitled to on partition, or the share which by Hindu law he would be entitled to sell, to discharge the debt for which the sale took place, and that the question what was

1. (1885) I. L. R. 11 C. 449.
2. (1886) I. L. R. 13 C. 110.
3. (1894) I. L. R. 22 C. 241.
4. (1896) I. L. R. 23 C. 420.
5. (1904) I. L. R. 32 C. 178.
6. (1897) I. L. R. 19 A. 506.
7. (1892) I. L. R. 20 C. 353.
8. (1893) I. L. R. 21 C. 121.
9. (1893) I. L. R. 21 C 92.
10. (1895) I. L. R. 20 B. 540.
11. (1895) I. L. R. 17 A. 241.
12. (1901) I. L. R. 25 M. 534.
13. (1904) 6 Bom. L. R. 897.

actually sold in each case is a mixed question of law and fact. Cf. *Maruti Sakharam* v. *Babaji*[1] [and see *Bhana* v. *Chindhu*[2] and *Joharmal* v. *Eknath.*[3] See also the notes on *Mauruti* v. *Babaji*[1] below:—Ed.]—*Held further* that, where service vatan lands are enfranchised, and the services in receipt of them dispensed with, although the presumption is that such lands cease to be inalienable, the presumption may be rebutted by evidence showing that it was intended to preserve their original character of inalienability. [As to whether vatan lands held by the father for service are assets in the hands of the son, see *Narayan* v. *Ramrao.*[4] —Ed.]

*** Venkatesh Prabhu *v.* Babu Subraya.**—I. L. R., 15 B. [* 187] 44.—*Material alteration of a document—Subsequent addition of an attesting witness's signature*:—Where the signature of an attesting witness was affixed, after the execution of bond, it was held that the alteration was not material and did not vitiate the bond. The decision in *Sitaram* v. *Daji*[5] was dissented from, and the decision in *Mohesh Chundur* v. *Kamini Kumari Debia*[6] approved. [*See Ramayyar* v. *Shanmugam*[7]:—Ed.] Cf. *Govindasami* v. *Kuppusami*,[7] in which, it was held, that the alteration of the date was a material alteration—*Christacharlu* v. *Karibasayya.*[8] [In order that the rule in *Master* v. *Miller*[9] may at all apply, the alteration must be material. See *Abdool* v. *Goolam*[10]. As to what is a material alteration, see *Gour Chandra Das* v. *Prasanna Kumar Chandra*[11]. The rule has no application where property has passed and the instrument is used as evidence of such passing of property. See *Mangal Sen* v. *Shankar Sahai*[12] where the intrument is used only as evidence and is not made the foundation of the claim. See *Harendra Lal* v. *Uma Charan*[13] and *Atmaram* v. *Umedram*[14]:—Ed.]

Queen Empress *v.* Ramachandra Matadin.—I. L. R. 15 B. 45.—*Bombay Abkari Act, Ss.* 45 *and* 53.—Under S. 45 of the

1. (1890) I. L. R. 15 B. 87.
2. (1896) I. L. R. 21 B. 616.
3. (1900) 3 Bom. L. R. 322.
4. (1900) 3 Bom. L. R. 482.
5. (1883) I. L. R. 7 B. 418.
6. (1885) I. L. R. 12 C. 313.
7. (1891) I. L. R. 15 M. 70.
8. I. L. R. 9 M. 399 : S. A. 278 of 1888.
9. (1791) 18 M L. C. 767; 2 R.R. 399.
10. (1905) 7 Bom. L. R. 742.
11. (1906) I. L. R. 33 C. 812.
12. (1903) I. L. R. 25 A. 580. *But see Sabrahmania Ayyar* v. *Krishna Ayyar*, (1899) I. L. R. 23 M. 137.
13. (1905) 9 C. W. N. 695.
14. (1901) I. L. R. 25 B. 616.

Bombay Abkari Act (V of 1878) the servant of a licensee, not being himself the holder of a license, is not punishable, notwithstanding the provisions of S. 53 of the Act. Cf. Ss. 55 and 64 of the Madras Abkari Act, I of 1886.

Krishnaji Mahadev Mahajan *v.* **Moro Mahadev Mahajan**.—I. L. R. 15. B. 32.—*Self-acquisition -Estoppel by conduct* :—In this case it was held that when a member of an undivded Hindu family has received only an elementary education at the expense of the family funds, property acquired by him as a kakun is self-acquired and impartible. [See also *Lachmin Kuar* v. *Debi Prasad* [1] :—Ed.] *Held* further, that if he allows his undivided brother to hold himself out as the owner, and to mortgage such property, he is estopped from disputing the mortgage, if it was made for the benefit of the family. See S. 41 of the Transfer of Property Act, IV of 1882.

Mosa Joshi *v.* **Ramchandra Dinkar Joshi**.—I. L. R. 15 B. 24.—*Held* that the owner of a share in the equity of redemption may sue to redeem the whole mortgage. [See also *Huthasanan Nambudri* v. *Parameswaram* [2] :—Ed.] He need not sue his co-owners for partition, and the fact that one of the mortgagees has purchased a portion of the equity of redemption does not affect his right. [As to the question that no partition suit was necessary, see *Narayan* v. *Ganpat.* [3] But where the mortgagee, or all the mortgagees where there are several, purchase a portion of the mortgaged property, the mortgagor may sue for redemption of his own share. See *Kallan* v. *Khan Mardan Khan* [4] :—Ed.]

Goverdhan Das Goculdas Tejpal *v.* **Bank of Bengal**.—I. L. R. 15 B. 48.—*Creditor and surety—Surety for part of a debt—Surety's right, after payment, to securities—Contract Act, S.* 141 :—Mr. Justice *Farran held*, (1) that according to the Indian Contract Act, S. 141, a surety is entitled to the benefit of every security, which the creditor has against the principal debtor at the time when the contract of suretyship is entered into. The Contract Act, however, does not lay down *when* the surety is entitled to have the security made over to him wholly or in part, whether it is when the debt of the creditor is paid off, or when the *surety* pays the amount of *his* guarantee, and that therefore

1. (1897) I. L. R. 20 A. 435.
2. (1898) I. L. R. 22 M. 209.
3. (1896) I. L. R. 21 B. 619 at p. 625.
4. (1905) I. L. R. 28 A. 155.

we must have recourse to the English authorities to solve the question. *Held* (2) after a very full and elaborate examination of the English cases on the subject, that a surety who has guaranteed an *aliquot* and defined portion of a past due debt secured by a mortgage, is *not entitled on payment by him of the portion of* the debt* which he has guaranteed, to share in such mortgage in proportion to the amount of the debt, which he has guaranteed and paid, *before* the mortgagee has been paid the full amount of his mortgage debt, as the creditor's right to hold his security until his whole debt is paid is paramount to the surety's claim upon such securities, which only arises when the creditor's claim against such securities has been satisfied. The striking difference in language between Ss. 140 and 141 of the Contract Act also supports the above view. *Goodwin* v. *Gray*[1] does not apply to this case. [* 188]

Onkarapa *v.* Subaji Pandurang.— I. L. R. 15 B. 71.— *Landlord and tenant—Ejectment—Tenant spending money.—Held*: The mere fact that a tenant was allowed to spend money on a cow-house, and convert it into a dwelling house, will not estop the landlord from ejecting the tenant, unless the tenant proves that he " built it in the hope or encouragement by the plaintiff, of an extended term, or allowance for expenditure." *Ramsden* v. *Dyson*[2] followed. *Held* further, that the tenant had the full benefit of his expenditure by his having been in possession for 40 years. *Gungadhur Shikadar* v. *Ayimuddeen Shah Biswa*[3] distinguished as referring to a case where the tenant originally entered for building purposes. See *Prosunno Coomaree Debea* v. *Sheik Rutton Bepary*[4]. [See *Gregory* v. *Mighell*[5]; *Plummer* v. *The Mayor*, etc., *of Willington*[6]; *Ahmad Yar Khan* v. *The Secretary of State for India*[7]; *Nundo Kumar Nasker* v. *Bonamali Gayan*[8]; and *Municipal Corporation of Bombay* v. *The Secretary of State*[9]: —ED.]

The Collector of Kanara *v.* Krishnappa Hedge.— I. L. R. 15 B. 77—*Withdrawal of suit by pauper—Order for payment of Court fees—Collector not a party—Can move under* S. 622,

1. (1871) L. R. 6 Ch. App. 192.
2. (1866) L. R. 1 H.L. 170.
3. (1882) I. L. R. 8 C. 360.
4. (1877) I. L. R. 3 C. 696.
5. (1811) 18 Ves. 328.
6. (1884) 8 A. C. 699.
7. (1901) I.L.R. 28 C. 693: s. c. L. R. 28 I.A. 211
8. (1902) I.L.R. 29 C.871(884).
9. (1904) I.L.R. 29 B. 580 (611,612.)

C. P. C:—The Bombay High Court *held*, following the *Collector of Ratnagiri* v. *Janardan Kamat*[1] and dissenting from *The Secretary of State for India in Council*[2] that the Collector, though not a party to a pauper suit, may move the Court under S. 622, when the Court has not made any order as to Court fees, &c., under S. 412. But S. 412 applies only where there has been *adjudicated* failure, and not when the case has been *withdrawn* and the suit dismissed consequently. Cf. *Shoshee Churn* v. *Kamarli*.[3] [But see *The Secretary of State* v. *Narayana Balkrishna*.[4] The question is concluded so far as the Bombay High Court is concerned by the decision in *Secretary of State* v. *Bagirathibai*[5] where it was held that a withdrawal from the suit without permission, though as a result of the compromise between the parties, was "*failure*" within the meaning of S. 412, C. P. C.—ED.]

Balu Bhai Daya Bhai *v.* Nasar Bin Abdul Habi Fazly.—I. L. R. 15 B. 79.—*Interpretation—Statute—Prospective—Pending execution proceedings—Succession Certificate Act of* 1889:—*Held*, following the Indian cases on the subject, Statutes are *prima facie* deemed to be prospective only, and when the law is altered while a suit or application is pending, the law as it existed when the action or application was commenced, must decide the rights of the parties, unless it is clear from the language that it should be otherwise. In Cl. (*b*) Sub-s. 1, S. 4, Act VII of 1889, '*application*' means one made after the Act came into force, and '*proceeding in execution*' must be an initial one under the application, and not one in continuation of proceedings taken on application made before the Act came into force. Cf. *Malikan* v. *Sankunni*[6]. [See also *Chunniram* v. *Umaji*[7] and *Rama Rao* v. *Chellayamma*[8] :—ED.]

Maruti Sakharam *v.* Babaji.—I.L. R. 15 B. 87.—*Hindu Law—Money decree against father—Interest sold in execution*:—*Held*, that in the case of a money decree against the father, in [*189] the absence of special circumstances showing* an intention to put up the entire interest of the family in the property, only the interest of the father passes to the auction-purchaser. *Hurdey*

1. (1882) I. L. R. 6 B. 590.
2. (1878) 2 C. L. R. 461.
3. 1 Shome 266
4. (1904) I. L. R. 29 B. 102
5. (1906) I. L. R. 3 1 B 10 s. c. 8 Bom. L R. 68.
6. (1889) I. L. R. 12 M. 502.
7. (1890) I.L.R. 15 B. 26
8. (1891) I. L. R. 14 M. 458 ; s. c. 1 M. L. J. 6

Narain v. *Pandit Rooder Perkash*[1] and *Simbunath* v. *Golab Singh*[2] referred to as settling the question. *Bhagbut Pershad* v. *Girja Koer*,[3] *Nanomi* v. *Modun*,[4] *Minakshi Naidu* v. *Immudi Kanaka*[5] and *Mahabir Pershad* v. *Markunda Nath*[6] distinguished, as in those cases there were other special circumstances, which shewed conclusively that the entire estate was sold. Cf. *Appaji Bapuji* v. *Keshav Shamrav*[7] (and the criticism thereon. See also *Muhamamd Husain* v. *Dip Chand*,[8] *Bhana* v. *Chindhu*[9] and *Joharmal* v. *Eknath*[10] :—ED.)

Watson and Company v. Ramchund Dutt.—I. L. R. 18 C. 10.—*Rights on joint property in the possession of a co-owner*:—In this case the Privy Council held, that if there be two or more tenants in common, and one be in actual occupation of part of the estate, and engaged in cultivating that part, in a proper course of cultivation, as if it were his separate property, and another tenant in common attempts to come upon the said part for the purpose of carrying on operations there, inconsistent with the course of cultivation in which the former is engaged and the profitable use by him of the said part, and he resists and prevents such entry not in denial of the latter's title but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of the former would not entitle the latter to a decree for joint possession or injunction. It would not be consistent with the rule of equity and good conscience, to restrain the co-sharer, under the above circumstances, from proceeding with his cultivation. [The rights of co-sharers are discussed in this case and the case of *Lachmeswar Singh* v. *Manowar*.[11] They are well stated by Mr. Justice *Mookerjee* in *Mahash Narain* v. *Nowbat*.[12] As to the caution to be exercised by the Courts in interfering with the enjoyment of joint estates as between their co-wners, see *Lachmeswar Singh* v. *Manowar*.[11] As to the remedy of a person dissatisfied with his co-sharer, see

1. (1883) L. R. 11 I. A. 26: s. c. I. L. R. 10 C. 126.
2. (1887) I. L. R. 14 C. 572.
3. (1888) L. R. 15 C. 717.
4. (1885) L. R. 13 C. 21.
5. (1888) I. L. R. 12 M. 142.
6. (1889) L.R. 17 I. A. 11.
7. (1890) I. L. R. 15 B. 13.
8. (1892) I. L. R. 14 A. 191.
9. (1896) I. L. R. 21 B. 616 (618, 619).
10. (1899) I. L. R. 24 B. 343.
11. (1891) I. L. R. 19 C. 253 (265) See this case explained in *Madan Mohun* v *Rajab*. (1900) I. L. R. 28 C. 223.
12. (1905) I. L. R. 32 C. 837.

Madan Mohum v. *Rajab Ali.*[1] As to the remedy in cases of exclusion, see *Dilubat Sardar* v. *Hosseim Ali,*[2] *Surendra Narain* v. *Hari Mohan*[3] and *Jagat Nath* v. *Jai Nath.*[4] As to whether a decree for joint possession can be passed, see *Ram Charan* v. *Kauleshar Rai.*[5] See also *Ittappan* v. *Manavikrama.*[6] As to the form of the decree, see *Phani Singh* v. *Nawab Singh.*[7] If one sharer appropriates all the profits and more than his share, he must compensate the others. See *Watson's case* and *Amba Deby* v. *Jnanoda Sundari.*[8] —Ed.]

In the matter of the Ganges Steam Tug Company, Limited.—I. L. R. C. 18 C. 31.—*Held* that a liquidator of a Company being voluntarily wound up, who is charged with the duty of carrying on the business of the Company for an indefinite time, has power to borrow on the credit of the assets of the Company. *Held* per *Petheram* C. J., that a person who makes a contract with an agent, whether known to be such or not at the time of contract, may look directly to the principal for payment, unless the contract otherwise provides—*Calder* v. *Dobell.*[9] *Held* per *Wilson and Pigot,* JJ. that the realized assets of a Company divided among the shareholders in accordance with a resolution are assets under Clause (*f*) of S. 144 of the Indian Companies Act.

Queen-Empress *v.* Trailokya Nath Baral.—I. L. R 18 C. 39.—*Stamp Act—Rule* 5 *under Notification No.* 1288:—The absence of the certificate required by Rule 5 (*b*) of the Rules issued by the Governor-General in Council does not make the document in question "not duly stamped." The non-compliance by the Treasury Officer or Stamp Vendor with the direction to give such a certificate, is not an act for which the person purchasing the stamp from him can be punished by the invalidation of the stamp innocently purchased.

Miller *v.* Budh Singh Dudhuria.—I. L. R. 18 C. 43.—*Insolvent Act—Official Assignee substituted for insolvent defendant*:—A debtor having been declared an insolvent, a suit was instituted [* 190] against him in a mofussil* Court by a creditor, and the Official

1. (1900) I. L. R. 28 C. 223.
2. (1899) I. L. R. 26 C. 553 (555)
3. (1900) I. L. R. 33 C. 1201.
4. (1904) I. L. R. 27 A. 88.
5. (1904) I. L. R. 27 A. 153.
6. (1897) I. L. R. 21 M. 153 (159, 160, 165, 166).
7. (1905) I. L. R. 28 A. 161.
8. (1899) 4 C. L. J. 254 (256).
9. (1871) L. R. 6 C. P. 486.

Assignee made a party defendant. *Held* that the Official Assignee ought not to have been made a party and the judgment was bad in law. [See *Chandmull* v. *Ranee Soondery Dossee* [1] where the Official Assignee was held not to be a legal representative of the debtor within the meaning of Ss. 244 and 252 in the case of a money claim. But the Official Assignee will be a necessary party in the case of mortgage suits or suits relating to property (*Bardeo Parshad* v. *Miller*[2]) and a decree passed without his being made a party will not bind him—*Punithavelu* v. *Bhashyam.*[3]—Ed.]

Queen-Empress *v.* Hurree Mohun Mythee.—I. L. R. 18 C. 49.—*Sexual intercourse with immature wife—Death—Rash and negligent act* :—The prisoner, a fully developed adult, had sexual intercourse with his wife, 11 years and 3 months old, who had not attained puberty and was immature and wholly unfit for it. The girl died in consequence of hæmorrhage from a rupture of the vagina caused by the prisoner having sexual intercourse. *Held* that when the girl is a wife and above the age of 10 years, and when therefore the law of rape does not apply, it does not follow that the law regards the wife as a thing made over to be the absolute property of her husband, or as a person outside the protection of the criminal law, and that the question for determination was whether, under the particular circumstances, having regard to the physical condition of the girl, and to the intention and knowledge, and the degree of rashness or negligence with which the accused is shewn to have acted on the occasion in question, he has brought himself within the criminal law.

Mondakini Dasi *v.* Adinath Dey.—I. L. R. 18 C. 69.—*Adoption by younger widow—Minor—Divesting estate* :—A Hindu who was the last male proprietor died leaving two widows with power to adopt a son. The younger widow, aged about 12 years, adopted a son on the refusal of the elder to make the adoption. *Held* that the adoption by the minor widow, who had been authorised by her husband of full age, to adopt the specific boy, and who was possessed of sufficient maturity of understanding, was valid in law, and that the adopted son divested the estate of the widows. *Held* further, that a son adopted to the last male

1. (1894) I. L. R. 22 C. 259. See also *Punithavelu* v. *Bashyam* (1901) I. L. R. 25 M. 406 (422).
2. (1904) I. L. R. 31 C. 667.
3. (1901) I. L. R. 25 M. 406 (422, 423.)

proprietor, who was the full owner of an estate, divests the interest of any person in that estate, whose title by inheritance is inferior to his, though he is not entitled to claim as preferential heir the estate of any other person besides his adoptive father, when such estate has vested before his adoption in some heir other than the widow who adopted him.

See *Ramabhai* v. *Rukmabai*[1] and cf. *Chindra* v. *Gojaratni*.[2] [See also *Surendra Nandan* v. *Sailaja Kant*,[3] *Faizudin* v. *Tincowri*[4] and *Sreeramulu* v. *Kristamma*.[5] —Ed.]

Queen-Empress v. Maniruddin Mundal.—I. L. R. 18 C. 75.—Where a Deputy Magistrate discharged a person in a case triable exclusively by the Court of Session, and the District Magistrate issued a notice to him under S. 436, Cr. P. C., to shew cause why he should not be committed to the Sessions, it is competent to the District Magistrate, on cause being shown, to order further enquiry under S. 437.

Natabar Parue v. Kubir Parue.—I. L. R. 18 C. 80.—*Possessory suit—Nature of possession*:—S. 9 of the Specific Relief, Act does not apply to a suit for the possession of a right to fish in a *khal*, the soil of which belongs to another. *Cf. Krishna* v. *Akilanda*.[6] [See also *Fadujhala* v *Gour Mohun*.[7]—Ed.]

Jagi Ahir v. Bishen Dayal Singh.—I. L. R. 18 C. 83.—
[*191] *Provincial Small Cause Courts Act—Retrial—Deposit of decree amount*:—Before a new trial can* be granted under S. 17 of the Provincial Small Cause Courts Act, the applicant should deposit the amount of the decree with his application, or tender security for payment of the same. *Ramasami* v. *Kurisu*[8] dissented from.

Ram Narain Nursing Doss v. Ramchander Jankee Loll.—I. L. R. 18 C. 86.—*Reprsentative of deceased partner joining in suit--Certificate of heirship--Separate property of Hindu —Held*: that having regard to S. 45 of the Indian Contract Act, the representatives of a deceased partner must be made parties with the surviving partner or partners in suits for the recovery of debts due to the entire partnership. *Held also*, that the business not being

1. (1868) 5 B. H. C. R. A. C, 181.
2. (1890) I. L. R. 14 B. 463.
3. (1891) I.L.R. 18 C. 385 at pp. 396, 397.
4. (1895) I.L.R. 22 C. 565 (571, 572.)
5. (1892) I. L. R. 19 C. 544 (F.B.)
6. (1889) I. L. R. 13 M. 54.
7. (1902) I. L. R. 26 M. 143 (149, 152).
8. (1890) I. L. R. 13 M. 178.

family property, such representatives should obtain a certificate of heirship to the deceased partner under S. 4 of Act VII of 1889, whether or not they were members of a Hindu family governed by the Mitakshara Law.

See *per contra*, *Govind Prasad* v. *Chandar Sekhar* [1] as to the representative joining in the suit. [See also upon this point *Motilal Bechardoss* v. *Ghellabhai Hariram*, [2] *Chockalinga Pillai* v. *Natesa Ayyar* [3] where, however, the point was not necessary for decision, and *Debi Das* v. *Nirpat* [4] :—Ed.] See *Venkataramana* v. *Venkayya*[5] and C. R. P. 27 of 1890 (Madras High Court) quoted at p. 4 *supra* as to the certificate of heirship. [See also the other cases cited in the same page.]

Dwarka Nath Gupto *v*. The Corporation of Calcutta.—I. L. R. 18 C. 91.—*Damage to house by Municipal works—Cause of action, when—Limitation.*—In a suit by the plaintiff for the recovery of damages caused to his house by the negligence of the defendants in certain works done by them: *Held* that the right to sue accrued on the happening of damage by reason of the subsidence arising from the defendant's act, and that the suit, which was for an act done under the Municipal Act, was barred by S. 357 (Bengal Act IV of 1876), not having been commenced within 3 months after accrual of the right to sue. Cf. S. A. 975 of 1889 (Madras High Court.) [Cf. also *The Corporation of Calcutta* v. *Shyma Charan Pal.* [6] :—Ed.]

Latchmeswar Sing *v*. Chairman of the Darbhangha Municipality.—I. L. R. 18 C. 99.—*Guardian—Power of alienation—Land Acquisition Act—Insufficient compliance with the requirements of the Act—Compensation—Waiver on behalf of ward.*—The Privy Council *held*, that the Court of Wards has no power to alienate the land of a ward, as a present (for instance) to a Municipality; the guardian has no power to waive the ward's right to substantial compensation, when the ward's property is taken up for public purposes under Act X of 1870, though the owner himself, if a major, may do so. Acceptance of a nominal compensation of 1 Rupee is a waiver of the right to substantial compensation. Notwithstanding this, possession of the minor's land might lawfully have been acquired under the Act after making

1. (1887) I. L. R. 9 A. 486.
2. (1892) I. L. R. 17 B. 6.
3. (1893) I. L. R. 17 M. 147.
4. (1898) I. L. R. 20 A. 365.
5. (1890) I. L. R. 14 M. 377.
6. (1904) I. L. R. 32 C. 277.

an award under S. 14 or a reference to the Court under S. 15. But in this case, the provisions of the Act were held not to have been fulfilled. The Collector was both the Chairman of the Municipality and Agent of the Court of Wards, and had, by what the Privy Council termed a colorable proceeding, offered 1 Rupee as compensation to the Manager, who obtained the sanction of the Court to accept it, through the Collector himself as Agent of the Court. Though there was a reference to the Civil Court under S. 14, no dispute with regard to compensation for the land in question was [*192] referred, the dispute relating only to *compensation for lands held by others. The plaintiff was held entitled to possession. Cf. *The Court of Wards* v. *Sri Gourachandra.* [1] [See also *Raja Mohammad Muntaz Ali Khan* v. *Sakhwat Ali Khan.*[2]]

Kachal Hari v. **Queen-Empress.**—I. L. R. 18, C. 129. —*Deposition before Committing Magistrate—Not attested—Admission as evidence before Sessions Court—Evidence Act, Ss.* 80 *and* 114. The Court of Sessions is not bound to presume, nor ought it to presume, under Ss. 80 and 114 of the Evidence Act, that the deposition of a medical witness, taken before the committing Magistrate, was *taken and attested by the Magistate in the presence of the accused*, and the fact must appear either from the record, or must be proved by evidence, before such a deposition can be taken as evidence under S. 509 of the Criminal Procedure Code. See *Queen-Emprees* v. *Riding* [3] and *Queen-Empress* v. *Pophsing.*[4]

Siva Pershad Maity v. Nundolall Kar Maha Patra. —I.L.R. 18. C. 139.—*Suit to set aside sale in execution of decree—Fraud—Irregularity—Transfer of Property Act, Ss.* 88 and 89—*Decree nisi not absolute—Ss.* 244, 311, *C. C. P.* –When circumstances affecting the validity of a sale in execution of a decree are alleged to have been brought about by the fraud of one of the parties to a suit, and give rise to a question between those parties such as, apart from fraud, would be within the provisions of S. 244 a regular suit will not lie, even granting that a petition under S. 311 has been previously dismissed. [As to when a suit will lie and when not, see *Bhubon Mohun* v. *Nunda Lal*[5] *Ram Narain* v. *Sheo Bhunjan*; [6] *Golam Ahad Chowdhry* v. *Judhister Chundra*; [7]

1. (1889) M. L. J. 30.
2 (1901) L. R. 28 I. A. 190 (196) s. c. I. L. R. 23 A. 394 (404).
3. (1887) I. L. R. 9 A. 720.
4. (1887) I. L R. 10 A. 174.
5 (1899) I. L. R. 26 C. 324.
6. (1899) I. L. R. 27 C. 197.
7. (1902) I. L. R. 31 C. 142.

Kokil Singh v. *Edal Singh*;[1] *Hiradal* v. *Chundra Kanto.*[2] See also *Pran Nath* v. *Mohesh Chander*[3] affirmed on appeal to the Privy Council in *Radha Raman* v. *Pran Nath*,[4] and *Khagendra* v. *Pran Nath.*[5]—ED.] The fact that the sale was in execution of a mortgage decree under Ss. 88 and 89 of the Transfer of Property Act, though such a decree might not have been absolute as in the case of a decree for foreclosure, but was perhaps a decree *nisi* directing the sale, would not enable the party to maintain a separate suit for redeeming the mortgaged property. [See upon this point *Vedapuratti* v. *Vallabha Valiya.*[6] —ED.] *Held also*, that as the Court executing the decree had disposed of the plaintiff's objections the suit could not be treated as an application under S. 244 and relief given to the plaintiffs. Cf. *Viraraghava Aiyangar* v. *Venkatacharyar*,[7]

Mashiat-Unnisa *v.* **Rani**.—I. L. R. 13 A 1.—*Execution of decree—Limitation when by one of several defendants only Appeal against portion of the decree.—Held* per *Edge*, C. J., *Straight* and *Tyrrell* JJ.—Cl. 20 of Art. 179, Sch. II, of the Limitation Act applies only to those cases, where the parties to the execution proceedings were parties to the proceedings in appeal, and to cases, where one of several unsuccessful plaintiffs or defendants appeals against the *whole* decree on a ground *common* to all the plaintiffs or defendants. [But see *Dadi-un-Nissa* v. *Shams-ud-Din*;[7] *Harkanasen* v. *Biraj Mohan*;[8] *Gopal Chunder* v. *Gosami Das*;[9] *Abdul Rahiman* v. *Maidin Saiba*;[10] *Viraragava*; v. *Ponnammal*[11] *Krishnammachariar* v. *Mangammal*;[12] *Dhurma Lal* v. *Panna Lal.*[13] See also *Ganga Kuar* v. *Kesva Kuar.*[14]—ED.] It does not apply where one of several defendants, against each of whom the decree specifies the relief granted, appeals only against the portion of the decree unfavourable to him, without impeaching the portion of the decree against the other defendants. [But see *Nundun Lall* v. *Rai Joykishen*;[12] *Viraraghava* v. *Ponnammal*[11] *Krishnamachariar* v. *Mangammal.*[16]—ED.]

1. (1904) I. L. R. 31 C. 385.
2. (1897) I. L. R. 26 C. 539
3. (1897) I. L. R. 24 C. 546.
4. (1901) I. L. R. 29 C. 475. (15)
5. (1901) I. L. R 29 C. 395.
6. (1902) I. L R. 25 M. 300 (334).
7. (1895) I. L R. 17 A. 103 S. C. L. R. 29 I. A. 99.
8. (1896) I. L. R. 23 C. 876.
9. (1898) I. L. R. 25 C. 594.
10. (1896) I. L. R. 22 B. 500.
11. (1899) I. L. R. 23 M. 60.
12. (1902) I. L. R. 26 M. 91.
13. (1903) 3 A. L. J. 381.
14. (1904) I. A. L. J. 409.
15. (1889) I. L. R. 16 C. 598.

Per *Mahmood* and *Broadhurst* JJ.—The clause applies in all cases, where an appeal has been filed by any of the parties to the suit. [See *Krishnammachariar* v. *Mangammal*. [1] The same principle applies when the appeal is withdrawn.—*Jumangar* v. *Lakshmi Doss*. [2] —ED.]

Per *Mahmood* J.—The definition of 'decree' in the Civil Pro-
[* 193] cedure *Code cannot be imported into the Limitation Act for deciding questions of limitation unless there is special reference to it in the Act.

Per *Straight* J.— We are entitled to look to the Civil Procedure Code for information as to what the words 'appeal' and 'decree' mean in the Limitation Act.

Per contra see *Muthu* v. *Chellappa*[3] and *Raghunath Pershad* v. *Abdul Hye*,[4] neither of which is noticed in the judgment.

Kishan Lal v. Ganga Ram, I. L. R. 13 A. 28.—*T. P. Act, Ss.* 58, *cl.* (*b*) *and* 100—*Distinction between mortgage and charge.* —A bond, which made certain immoveable property security for a loan, described the transaction not by the word *rehan* or *mortgage*, but by the words *arh* and *mustaghracq*. There was no express covenant for sale, but there was a covenant prohibiting alienation until payment, and that if the property specified should be destroyed, or prove insufficient for the debt, the obligor should be personally liable. A decree for sale as in the case of an ordinary mortgage bond was obtained on the bond, but before execution the property was sold in execution of a simple money decree, the bond and the decree thereon not being known to the purchaser, or the judgment-creditor who brought the property to sale. The decree-holder on the bond having attached the property in execution of the decree, and the purchaser's objection to the attachment having been overruled, the present suit was brought to establish his right by purchase in priority to that of the holder of the bond. *Held* that the words *arh* and *mustaghracq* implied a power of sale in default of payment, and the transaction therefore amounted to a mortgage without possession, as defined in S. 58, cl. (*b*) and not a mere charge, as defined in S. 100, Act IV of 1882, and that plaintiff's right as a

1. I. L. R. 26 M. 91.
2. (1906) 16 M. L. J. R393.
3. (1889) I. L. R. 12 M. 479.
4. (1886) I. L. R. 14 C. 26.

bona fide purchaser could not therefore prevail against the defendant's.

Per *Mahmood* J.—The right of sale referred to in S. 58 (*b*) is not a power to be exercised by the mortgagee privately, without resorting to a Court. The observations of *Muthusami Aiyar* J. in *Rangasami* v. *Muthu Kumarappa*[1]; of the Bombay High Court in *Khemji Bhagvandas* v. *Rama*, and of Sir *C. Petharam*, C. J., in *Shuratan Kuar* v. *Mahial Kuar* dissented from.

Cf. *Onkar Ramshet Marwari* v. *The Firm known as Govardhan Parshotamdas.*[2] [Cf. also *Royzuddi Sheik* v. *Kali Nath Mookerjee.*[3]]

Radha Bai *v.* **Nathu Ram.**—I. L. R. 13 A. 66.—*Stamp Act—The description of stamps to be used for promissory notes, not chargeable with duty of* 6, 10 *or* 12 *annas.*—Notification No. 2995, dated 1st Dec. 1882 (issued under S. 9 of the Stamp Act) which is in the terms " Promissory notes drawn or made in British India and chargeable with a duty of annas 6, 10 or 12 shall be written on impressed sheets of those values bearing the word *hundi*" cannot be interpreted to mean that other promissory notes shall not be written on impressed paper of the value, if it happens to bear the word " *hundi.* "

***Mathavi Pillari** *v.* **Kelu Nambiar**—In this case (S. A. No. 546 of 1890, M. H. C.) the plaintiffs who were in possession of certain properties, brought a suit for a declaration that a deed of gift of the properties, executed by 1st defendant to defendants 4 to 6 did not affect their rights. After the institution of the suit, the plaintiff's tenants, attorned to defendants 4 to 6. The defendants contended that a suit for a mere declaration would not lie, as the plaintiffs had lost their possession of the properties. The Court (Sir *Arthur Collins* C. J. and *Handley* J.) held that the rights of the parties must be adjudicated with reference to the state of matters at the time the suit was filed, and that plaintiffs were entitled to a declaration. [*194]

Ref. Cas. 27 to 46 of 1889 (M. H. C.)—In these cases the High Court held that a Small Cause Court has jurisdiction to try a suit by a landlord against his tenants for the recovery of damages for loss caused by the cultivation of dry crops on wet lands, and

1. (1886) I. L. R. 10 M. 509. 2. (1890) I. L. R. 14 B. 577.
3. (1906) I. L. R. 33 C. 985 (993 *et seq*).

that the expression "suit for a declaratory decree" in clause 19 of Sec. II of Act IX of 1887 referred to suits "for a mere or naked declaration of title without any prayer for consequential relief." The law was the same under the old Small Cause Act.

[* 182] **SUMMARY OF ENGLISH CASES.***

Cox v. Hakes. [15 A. C. 506].

Habeas Corpus—Order of discharge by High Court—Appeal to the Court of Appeal.

Held by Lord *Halsbury*, L. C., Lords *Watson*, *Bramwell Herschell* and *Macnaghten*, Lords *Morris* and *Field* dissenting, that the Court of Appeal has no jurisdiction to enteiain an appeal from an order of the High Court discharging under a *habeas corpus* a person from custody. *Held* also that the terms of S. 19 of the *Judicature Act* that "the said Court of Appeal shall have jurisdictrion and power to hear and determine appeal from *any judgment or order*, save as hereinafter mentioned of Her Majesty's High Court of Justice," did not warrant an appeal in this case.

Bird v. Davey. [1891] I Q. B. 29.

Bill of sale—Attestation —Address and description— Compliance with form.

The form prescribed in the Schedule to the Bills of Sale Act, 1882 required the address and description of an attesting witness to a bill of sale, to be given in the attestation clause, so that they might appear on the face of the bill. When there were two attesting clauses, attesting the execution by different grantors, and it clearly appeared on the face of the bill that the signature in both the places was the same, *held* that an irresistible inference arose, that the attestation was by the same man, and the description and address given for one clause was sufficient compliance with the form.

Budget and Co. v. Binnington and Co. [1891] I Q. B. 35.

Contract by freighter—Demurrage—Failure of shipowner—Strike.

There was a contract by the freighter, by which he undertook, after a fixed number of lay days for unloading, to pay demurrage,

and by the custom of the port, the delivery was the joint act of the shipowner and the freighter. There was no exception of strikes made in the contract. But a strike taking place during the lay days among the labourers employed for the ship as well as for the consignees, delivery could not be completed till some time after the expiry of the lay days; *held* that the consignees were liable to pay demurrage, * notwithstanding the inability [*183] of the shipowners on account of the strike, to do their part in the unloading, because it was due to the acts of persons over whom they had no control.

Smith Hill and Co. *v.* Pyman Bell and Co.

[1891] I Q. B. 42.

Agreement to advance freight—Loss of ship—Liability of freighter.

Where a charter-party contained a stipulation that one-third freight should be advanced, if required, but the vessel was wrecked shortly after commencement of the voyage, *held* that the shipowner could still claim payment of the advance freight.

Burnley Equitable Co-operative and Industrial Society, Ld. *v.* Casson. [1891] I Q. B. 75.

Apprenticeship with corporation—Legality.

A contract of apprenticeship by a minor is not invalid by reason of the fact that the master to whom the apprentice is bound is a corporation.

Chatenay *v.* The Brazilian Sub-Marine Telegraph Co., Ld. [1891] I Q. B. 79.

Conflict of laws—Foreign power of attorney—Translation and expert evidence—Intention that power should be acted on in England —Construction.

A power of attorney was given by a Brazilian subject in Brazil to a broker in London to buy and sell shares. The question arose whether the construction of the power of attorney was governed by the Brazilian or the English law. *Held* by the Court of Appeal that the intention of the writer must be ascertained by the evidence of competent translators and experts including, if

necessary, Brazilian lawyers, as to the meaning of the language used, and that the extent of the authority should be ascertained, so far as transactions in England were concerned, by English law, if the intention appeared that the authority should be acted on in England. *Held* further that, if a contract is made in one country to be carried out between the parties in another country either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country.

Stanley v. Powell. [1891] I Q. B. 86.

Wounding with gun—Accident—Absence of negligence—Liability.

A trespass to the person is not actionable if it be neither intentional not the result of negligence. The defendant who belonged to a shooting party fired at a bird. A pellet from his gun glanced off the bough of a tree and accidentally wounded the plaintiff who was engaged in carrying cartridges and game for the party. On the finding of the jury that the defendant was not guilty of negligence, the Court held him not liable.

The Mayor, Aldermen, and Citizens of Manchester v. Williams. [1891] I Q. B. 94.

Libel—Corporation charged with corruption—Whether actionable.

A corporation charged with corrupt practices brought an action for libel but no allegation of special damage in consequence of the libel was made. *Held* that there was no cause of action as the corporation, as distinguished from its members, cannot be guilty of corruption.—

Metropolitan Saloon Omnibus Co. v. *Hawkins*, commented on. See Clerk and Lindsell on Torts (3rd Edn.) pp. 522, 523 :[1] Ed.]

Hewett v. Barr. [1891] I Q. B. 98.

Held by Lord *Esher*, M. R. and *Lopes*, that the time for [*183] renewing a writ of summons after twelve months * from the date of the writ cannot be extended where the plaintiff's claim would, in

1. (1859) 4 H. and N. 90. S. C. 28 L. J. Ex. 201.

the absence of such renewal, be barred by limitation; Per *Kay* L. J.—*Semble*: there would be a discretion to extend the time in such a case for exceptional reasons.

[*Doyle* v. *Kaufman*,[1] followed.]

Bell and Co. *v.* Antwerp, London and Brazil Line. [1891] I Q. B. 103.

Contract—Performance within jurisdiction—Service out of jurisdiction.

A foreign company chartered a ship from English owners to take a cargo from London to a foreign port, and it was stipulated in the charter-party that all lighterage should be at consignees' or charterers' risk and expense, the charterers indemnifying the shipowners in respect of it; but no place was specified for payment of money that might become payable under the indemnity clause. *Held* that the contract was not one which ought to be performed within the jurisdiction of the court, within the meaning of Order XX, rule I (*c*), and therefore leave could not be given, in an action upon the contract against the foreign company, to serve notice of the writ out of the jurisdiction.

The Queen *v.* Bowerman. [1891] I Q. B. 112.

Misappropriation by agent—Acceptance of bill of exchange—Bill incomplete at time of delivery to agent—Criminal law.

The prosecutors being desirous of raising money upon their acceptances, agreed with the prisoner that he should draw bills upon them up to a certain amount, and after acceptance by them he should get the bills discounted, and pay a certain proportion of the proceeds to them. In pursuance of this arrangement bills were accepted by them and handed back to the prisoner, but without the drawer's name being inserted, though complete in other respects. The drawer's name was afterwards inserted by the prisoner and the bills discounted, but the whole proceeds misappropriated in contravention of the agreement. *Held* that the acceptances at the time of delivery by the prosecutors to the prisoner were securities for the payment of money within the meaning of 24 & 25 Vic., Ch. 96, S. 75.

1. (1877) 3 Q. B. D. 340.

In re **The Apollinaris Company's Trademarks.** [1891] I Ch. I.

Security for costs—Appellant not resident in Great Britain—

Where a French Company, carrying on a branch business in England as mineral water merchants, and having stock in trade, plant, horses, vans, and book debts, of considerable value, in England, preferred an appeal to the Court of Appeal, and the respondent moved that the appellants be ordered to give security for the costs of the appeal, on the ground that the property possessed by the appellants, in England, was floating property easily carried away abroad: *Held* by Lord *Halsbury*, L. C and *Bowen* and *Fry*, L. JJ., that considering the nature of the business carried on by the appellant Company, there could be no reasonable doubt, that their assets in the country would be found capable of answering any possible costs of the appeal, and the appellants could not, therefore, be called upon to give security—see S. 549, C. P. C., which closely resembles the rule of English law embodied in Order XVII, rule 15.

Taylor *v.* Russell. [1891] I Ch. 81.

Equitable mortgages—Priorities—Negligence—Fraud.

One Wilkinson, the surviving trustee of certain estates
[* 185] *under a will, made a legal mortgage of certain properties to the trustees of one *L*, and subsequently sold a portion of the mortgaged properties to one Toward. Toward concocted a forged title deed of the properties, representing them to be the properties of one *S*, purchased by him, and made an equitable mortgage of them to the plaintiff. He subsequently made another equitable mortgage to the defendant, depositing with him the true title-deeds obtained from Wilkinson; plaintiff was unaware of the mortgage to the trustees of *L*, and the defendant was unaware of both the mortgage to *L* and the equitable mortgage to the plaintiff. The defendant, subsequently learning of both the prior mortgages, induced the trustees of *L* to reconvey the legal estate (in the properties sold to Toward) to Wilkinson, free from their mortgage, on condition that Wilkinson should convey it to the defendant. Wilkinson did so, though aware of the prior equitable mortgage to the plaintiff. Plaintiff sued to establish his priority over the defendant's equitable mortgage. *Kay* J., who tried the

suit in the first instance, decreed for the plaintiff, holding that in the case of two innocent holders of equitable mortgages under a fraudulent mortgagor, mere carelessness or want of prudence on the part of the first mortgagee, is not sufficient to postpone him to the subsequent mortgagee, but there must be gross negligence, leading to the fraud on the second mortgagee; that there is no difference between this case and one in which the first mortgage is a legal mortgage, with regard to the extent of negligence in the prior mortgagee, required to make him forefeit his right of priority over the subsequent mortgagee. He further held that the conveyance of the legal estate to the defendant could not help him, as Wilkinson was aware of the plaintiff's prior mortgage, and was bound to convey the legal estate to him, in preference to the defendant. The defendant appealed, contending, first, that the same degree of negligence was not necessary in a prior equitable mortgagee, as in a prior legal mortgagee, to postpone him to a subsequent mortgagee, and secondly, even if that were otherwise, the possession of the legal estate gave the second mortgagee priority. The Court of Appeal did not decide the first point, but reversed the decision on the second. The Court held that, as the defendant has not assisted or connived at the fraud on the plaintiff and had originally advanced his money *bona fide*, he was entitled to the benefit of the legal estate he had obtained, notwithstanding notice of the prior mortgages. *Held* further, with respect to an argument that in conveying the legal estate to defendant the trusts of the will were violated by Wilkinson, that Wilkinson, having bought the legal estate expressly for the defendant, was right in conveying it to him. The Judges said that, though he might be guilty of a breach of trust towards the beneficiaries under the will in conveying the legal estate to the defendant, this could not help the plaintiff, for a trust or equity to affect the conscience of a person, who gets in the legal estate, must be a trust or equity in favour of the person against whom the legal estate is set up, and not in favour of a third person.

Halifax Joint Stock Banking Co. *v.* Gledhill.

[1891] I Ch. 31.

Alienations to defraud creditors—Bona fide purchase. –

A person made a *settlement of property with intention to [* 186] defraud his creditors, and in the settlement reserved a reversionary

interest for himself. He subsequently made an equitable mortgage of this reversionary interest to a person, who advanced money *bona fide*. In a suit by creditors to set aside the settlement on the ground that it was made in fraud of creditors: *Held* by *Kay* J. that the term "*bona fide* purchaser" includes a purchaser of any interest under the deed impeached, whether the interest be legal or equitable; that the interest of the equitable mortgagee of the settlor's reversionary interest was therefore protected, though the settlement was void as against the plaintiffs and other creditors of the settlors. A similar construction would seem to hold good with regard to S. 53 of the Transfer of Property Act. 13 El. Ch. 5, S. 1, is similar to the provision enacted in the first paragraph of S. 53 of the Transfer of Property Act, and the rights of *bona fide* purchasers are saved by S. 5 of the English Statute as by the last paragraph of S. 53 of the Indian Act.

[* 194] CRIMINAL RULINGS.*

1. *Enhancement, meaning* of; *Criminal Revision* 460 *of* 1888 *North Arcot.*

Appeal Case No. 20 of 1888 on the file of the Head Assistant Magistrate.—In Calendar Case No. 112 of 1888 on his file, the Sub-Magistrate of Kalahasti convicted and sentenced the accused to 3 months' rigorous imprisonment for cheating. On appeal, the Head Assistant Magistrate upheld the conviction, but modified the sentence into one of 2 months' rigorous imprisonment and 30 rupees fine, or in default, one month's additional rigorous imprisonment. The District Magistrate submitted that the modified sentence seemed to him to resemble an enhancement of the sentence. The High Court did not think there was any enhancement of the sentence. If the accused was in a position to pay the fine and paid it, the nature of the sentence would be altered, but the sentence would not be enhanced. If he could not and did not pay the fine, the sentence would remain unaltered. *27th August* 1888.

2. *Oral acquittal—Subsequent written judgment convicting the accused—Criminal Revision* 691 *of* 1888, *North Arcot.*

Calendar Case No. 120 of 1888, on the file of the 2nd Class Magistrate, Gudiattum.—In this case the Taluq Magistrate appeared to have orally acquitted the accused, but in delivering

his written judgment he convicted him. The referring officer submitted the opinion of the Joint Magistrate (on appeal), that though the sentence is right on the merits, the appellant is in illegal confinement, having been orally acquitted, as illegal. The High Court was of opinion, that as there was a written judgment, the oral declaration should be ignored altogether. The Joint Magistrate, who had already formed his opinion on the merits, was directed to pass judgment in accordance with law. *20th December* 1888.

*3. *Joinder of charges—Criminal Procedure Code, S.* 233—*Commitment quashed.—Criminal Revision* 385 *of* 1888, *North Arcot.* [* 195]

In Calendar Case No. 25 of 1888 on the file of the Sessions Court. The accused was committed to the Court of Sessions on two charges, 1st for the murder of his child, S. 302 I. P. C., and 2ndly, escaping from the custody of the Police after arrest, S. 224. Prisoner was tried on the 1st charge and acquitted and the Sessions Judge, treating the 2nd head of charge as void—the committal under that charge being illegal (S. 233, Cr. P. C.)—requested the High Court to quash the commitment under S. 224. The High Court, observing that the alleged offence under the 2nd head being triable by a Magistrate, the committal to the Court of Sessions was wrong, quashed the commitment under that head. *4th August* 1888.

MISCELLANEOUS.* [*160 161]

Proceedings.—The Madras High Court, having recently had occasion to direct the withdrawal, as illegal, of an order issued by a Divisional Magistrate, informing a Subordinate Magistrate, that a certain uncertificated person was " not a proper person to be allowed to appear in criminal cases as a pleader, " deems it desirable to circulate its observations on the case in question, for the purpose of reminding Subordinate Courts of the conditions under which private pleaders may be permitted to appear and plead.

2. The law gives to every Magistrate a discretion to permit persons, other than advocates and vakils, to act in criminal proceedings before him. This discretion is to be exercised by the Magistrate, according to the circumstances of each individual case, and an order of the kind described above would, if operative, improperly restrict the use of this discretion.

3. The High Court considers it necessary, however, to add that the custom which, there is reason to believe, largely prevails in inferior Courts, of allowing unlicensed persons to practise systematically, and as a matter of course, is very reprehensible. Every Magistrate is bound, in each case that comes before him, to use the discretion vested in him by law, before giving audience to an uncertificated pleader, and in deciding whether permission should be given or not, the character of the person appointed to plead is one of the matters to be taken into consideration. (*30th October* 1890.)

The following Rules have been framed by the Madras High Court under S. 37 of the Letters Patent (amended).

1. Appeals to the High Court, Appellate Side, under S. 15 of the Letters Patent, from the judgment of a Division Court on the Appellate Side, confirming the judgment of a lower Court under S. 575, Civil Procedure Code, or from the judgment of one Judge of a Division Court on the Appellate Side, shall be preferred within 30 days after the date of the judgment appealed from, unless the Court, in its discretion, on good cause shown, shall grant further time.

2. Such appeals, if from the judgment of a Division Court, confirming the judgment of a lower Court, under S. 575, Civil Procedure Code, shall be heard by a Division Court consisting of at least three Judges, including both or neither of the Judges of the Division Court, from whose judgment the appeal is preferred; and if from the judgment of one Judge of a Division bench, shall be heard by a Division Court consisting of at least two Judges, other than the Judge from whose judgment the appeal is preferred.

3. Such appeals, if from judgments, shall be written on the stamp paper prescribed for appeals, and, if from orders, on the stamp paper prescribed for appeals from orders. (*17th February* 1890.)

The following rules have been framed by the Madras High Court under S. 652 of the Code of Civil Procedure :—

Every application for the appointment of a guardian of a minor defendant or respondent shall be supported by an affidavit, stating that the proposed guardian has no interest in the matters

in question in the suit or appeal, adverse to that of the minor, that he is a fit person to be so appointed and that he consents to act as guardian. But no order shall be passed on such application, when made by the plaintiff or the appellant, unless the Court is satisfied that notice of such application was duly served upon the father or the guardian of the minor, or upon the person with whom the minor resides, six clear days before the day named in such notice for the hearing of the application. (*21st November* 1890.)

The following additions and alterations have been made by the Madras High Court to the rules framed under the Legal Practitioners Act:—

Note to Rule 11:—After the Pleadership Examination to be held in the year 1904, no person will be entitled to appear for the First Grade Pleadership Examination, unless he shall have obtained the Degree of Bachelor of Arts of one of the British Indian Universities, or shall have passed such examination at one of the English, Irish, or Scotch Universities, as may hereafter be declared to entitle him to admission to the Pleadership Examination of the First Grade.

The following shall be added to *Rule* 12, *Clause* (*b*):—

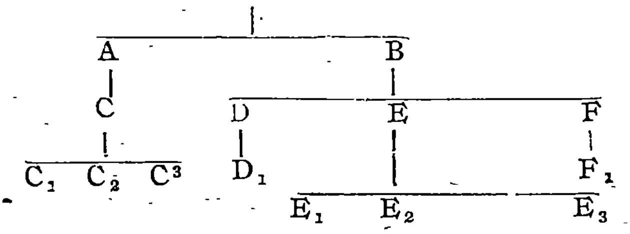
" Or the Madras Upper Secondary Examination, or any public examination in the Bengal or Bombay Presidency, which shall be accepted by two Judges of the Court, as being in their opinion equivalent to the Upper Secondary Examination. "

Note to Rule 12, *Clause* (*b*):—After the Pleadership Examination to be held in the year 1894, the words "First Examination in Arts of one of the British Indian Universities, or other examination which may hereafter be declared equivalent thereto" will be substituted for " Matriculation Examination of any British Indian University." (*10th September* 1890.)

HINDU LAW—PARTIAL PARTITION.* [*197]

The question which we propose to discuss is this—Suppose, in a Hindu family governed by the Mitakshara, some of the members become separate after effecting a partition of their shares, and the others continue to live together for some time and then wish to effect a partition among themselves, on what principle are shares to be allotted to them? Is it on the basis of the partition effected

on the previous occasion, or irrespective of the same, regard being had only to the state of the family at the time of the second partition ? The Madras High Court has taken the view that regard is to be had to the shares allotted at the first partition in computing the shares to be allotted at the second divison—*Manjanatha* v. *Narayana*.[1] We wish to examine the correctness of this decision. The facts of the case in question may be briefly stated as follows. A Hindu father had two sons A and B. A had a son C who had theree sons C_1, C_2, C_3 ; B had three sons D, E, F. D had a son D_1. E, three sons E_1, E_2, E_3 ; and F, one son F_1. The genealogical tree of the family may be drawn as below :—



The first two sons of C, that is, C_1 and C_2, the three sons of E, and the son of F brought a suit against the other members of the family in 1867 for partition and got a decree. The family property was divided into twelve shares, out of which six shares were allotted to A's branch, in which there were four co-parceners,
[* 198] including C. * C_1 and C_2 therefore got between them three shares. Out of the six shares allotted to B's branch, four went to the representatives of E and F. C, C_3 and D_1 continued to live together. C died in 1872. His son, C_3, brought a suit after his father's death against D_1 for partition. Out of the five shares which remained in the enjoyment of the two co-parceners, the Sub-Court awarded to the plaintiff two and a half shares, on the ground that in allotting shares at a second partition, the then state of the family should alone be considered, and not the state of the family when the other members separated from it. The High Court dissented from this view. *Muthusawmi Aiyar* J. held that the rule on which the Sub-Judge had acted, that as between different branches, divison should be by the stock, and that as between the sons of the same father, it should be *per capita*, had reference to cases in which all the co-parceners desired partition at the same

1. (1882) I.L.R. 5 M. 362 [The point raised in this case is as difficult as it was novel :—ED.]

time, and that it should not be applied indiscriminately to cases of partial division. The principle on which the rule was based was, that those who had capacity to confer equal spiritual benefits on the common ancestor ought to take equal shares. By applying the rule to families, where there had already been a partial division, he held that the principle of equality, from which the rule of division by the stock is deduced, was violated. As an instance, he cited the case of two brothers A and B each having two sons. If the two sons of A first separate from the family, and if A should afterwards desire partition from B and his sons, A would get, according to the principle laid down by the Sub-Judge, two-sixths share at the first partition, and a moiety of the remaining four-sixths at the second partition, and thus his share would, on the whole, amount to four-sixths, which is in excess, by one-sixth, of the moiety which alone he was entitled to get. As, at the first partition, allotments due to the other co-parceners were determined by an act of the mind, for the purpose of computing the shares which were allotted to those who desired to separate, the same should be taken into account in calculating the shares to be awarded at the second partition, in order that unequal partition, which is forbidden by law, may be avoided. He held that his view was confirmed by the Smrithichandrika[1] (Ch. xii, para. 4), in which it is said with reference to a second partition among re-united parceners, that the shares may be unequal, where the common wealth at the time of re-union* is made up of disproportionate contributions, and the in- [* 199]
equality must be proportionate to the difference in the extent of the contribution made by each parcener at the time of re-union. He, however, held that the principle laid down by him was subject to the reservation, that the shares of co-parceners in each branch might increase or decrease, according as existing co-parceners died, or new co-parceners were born, and when the joint family consisted of several branches, and one of those became extinct, the interest of that branch would survive to the others. He then discussed the question as to the status of the undivided members of a family, where there is a partial partition, and expressed his doubt of the soundness of the view taken by the Calcutta High Court[2] that their status is that of re-united parceners.[3] He

1. Kristnaswamy Iyer's Translation p. 208. See also Ch XII paras 3, 5, 6, 7.

2. (1879) I. L. R. 5 C. 474.

3. The Judicial Committee, however, apparently affirm this view. See *Balabux* v. *Rukhmabai*; (1903) I. L. R. 30 C. 725.

thought that there could be no re-union without a previous partition,[1] and that the mere arithmetical computation of the shares of those who did not seek partition, in order to ascertain the share of those who did seek partition, did not amount to a legal partition.[2] But being of opinion that this view did not in any way affect the decision of the case, he held that the plaintiff in addition to his own $1\frac{1}{2}$ shares succeeded by right of survivorship to the $1\frac{1}{2}$ shares of his father C, and decreed to him three shares out of the five. The same view was taken by *Innes*, Officiating Chief Justice. The question discussed in this case by these two learned Judges is no doubt a novel one, and is certainly beset with difficulties. The point of the decision seems to have escaped even the keen eye of Mr. Mayne, who though he cites the case (note *q*, page 510 of the 4th edition),[3] misses the point decided by it. Messrs. West and Buhler notice the case in note (*b*) page 698 of their book, and think that the suit by C_1 and C_2 in the lifetime of their father C was not maintainable. In regard to the principle, however, which was decided by the case, they express neither assent nor dissent, but simply state that by the introduction of the principle of deduction proposed by the Madras Court in the case of partial division, a result is brought about identical with that contended for in the Mayukha in the case of re-union[4] (Chap. IV, S. 9, pp. 2, 3), and that according to the theory of those who regard a partial partition as involving a general partition and partial re-union, each branch and sub-branch would be regarded as having rejoined with a share diminished by the sub-share of the severed member. The rule laid down in the
[* 200] Mayukha in* the case of re-union is similar to the one in the Smrithichandrika[5] that the shares of re-united co-parceners at a division are proportional to those brought in by them at the time of their re-union. It appears to us, that if the principle laid down by the

1. The Privy Council held in *Balabux* v. *Rukhmabai* (1903) I. L. R. 30 C. 725; 30 I. A. 130 that a re-union can only take place between persons who were parties to the original partition. These persons should bear certain relationships. See *Balkishen Das* v. *Ram Narain Sahu* (1903) I. L. R. 30 C. 738 ; 30 I. A. 139 P. C. :—Ed.

2. This view of the Madras Court did not apparently meet with the approval of the Privy Council in the case of *Balabux* v. *Rukhmabhai*, supra.

3. See note (*v*) p 640, para 473 (6th Edition.)

4. Stokes H. L. p 92. [But placitum 3 is really difficult to understand.]

5. Ch. XII para 4. Krishnasami Iyer's translation p. 208. See also Viramitrodaya Ch. IV: See Sirkar's Translation, p. 204.

Madras High Court can be accepted as sound, it can only be on the ground, that in all cases of partial division, there is a general partition, and partial re-union of those who continue unseparated[1]. *Muthusami Iyer* J. does not cite any authority as justifying the novel principle he has enunciated, except the rule laid down in the Smrithichandrika in cases of re-union. He also justifies his conclusion on certain equitable grounds which we shall deal with later on. The question which suggests itself is:—Why should a rule, which is laid down in regard to re-union, be applied to a case of partial division, unless such partial division amounts to a general division and subsequent partial re-union? No authority is mentioned as justifying this mixing up of the different principles applicable to a Hindu family, according as the members are undivided, or divided, or re-united, and acccording as the property which may be in dispute is the self-acquired property of any of the members, or the joint property of the family. The rules laid down in each of these cases are clear and distinct. If a Hindu is a member of an undivided Hindu family and the property is the joint property of the family, the law of partition and succession in regard to the same is governed by the law applicable to an undivided family. If he is a divided member, the rules of devolution of his family property are the rules laid down as applicable to a divided member, and similarly if he has re-united with any of his divided co-parceners, the rules of partition and succession of the property are those laid down as applicable to re-united members. The law further recognizes that the same member may be divided in regard to some property, and undivided, and perhaps re-united, in regard to other property. But we are not aware of any case, in which it has been held, that in regard to one and the same property, some of the rules applicable to undivided property, and some of the rules applicable to divided property, are at one and the same moment to be applied, to settle the law of partition or succession in regard to that property. In the case in

[1. That this seems to be theory having the sanction of the Privy Council will be seen from the case of *Balabux* v. *Rukhmabai;* (1903) I. L. R. 30 C. 725. The Privy Council say that it must be presumed that there is a partition and that subsequent re-union must be a matter of proof. But we do not think the Privy Council can be taken to have said that it is not open to some of the parties to remain undivided and for the others to separate where that can be proved. Such a partition cannot be made compulsorily by the Court. It may come into existence in a voluntary partition—ED.]

question the status of C_3 and D_1 is considered to be that of undivided members of a Hindu family, because the Court distinctly [* 201] finds that there has been no partition between* these two members, and yet the Court applies the rule applicable to re-united members to settle the shares on partition of the family property of the members of this undivided family. Mr. Justice *Muthusami Aiyar* says that the rule that as between different branches, division should be by the stock, and that as between the sons of the same father, it should be *per capita*, should not be applied indiscriminately in cases of partial division. The discrimination he would use in applying the rule is to take the shares allotted at the first division as the starting point to settle the shares in the second division. In other words the rule applied is not the original rule with any discrimination, but a different rule. Supposing we do try to apply the rule, we are confronted with difficulties which the learned Judge has not attempted to solve. Take the following case; a father A has two sons B and C and two grandsons E and F by another son D deceased. B and E sue the others for partition and get their shares. If the property is divided into thirty-two shares B would get 8 shares and E 4. The remaining 20 would remain with the family which continues undivided. Supposing A has another son G born to him subsequently by another wife, and he sues for partition A, C and F; to what share would he be entitled? If the rule applicable to an undivided family were to be applied, then out of the twenty shares remaining in the hands of the family at the time of the second suit G would get five shares. But according to the rule laid down by *Muthusami Aiyar* J. the shares of A, C and F have already been fixed. In what proportion are deductions to be made from their shares to make up the share of G? The shares of A, C and F at the original division were 8, 8, and 4 repectively. Is F to contribute one-half of what the others contribute or as much as the others do? If the rules applicable to an undivided family were applicable he would contribute equally with the others. If the rules applicable to a re-united family were applicable we think he would contribute only one-half. Suppose A and C were to die, in what proportions would F and G be entitled to divide the shares of the deceased persons, and would B be entitled to a share in the same with G as would apparently

be the case if it were a case of re-union proper[1] ? It is, therefore, clear that the law on the subject would get into utter confusion unless it were settled once for all, whether the status of the members is that of undivided or re-united* members of a Hindu [* 202] family and the rules applicable to either applied in their integrity. The Madras High Court rightly enough takes the view that though some of the members may have severed their connection, the remaining members constitute an undivided family, and that the mere fact that their shares had to be ascertained in order to settle the shares of those who wish to sever their connection with the family, does not amount to a partition among all the members of the family. There is clear authority to support the view of the Madras Court. The Privy Council has taken this view in the cases of *Rewun Prasad* v. *Radha Bibee*[2] and *Mussumat Cheetha* v. *Mihen Lall.*[3] These cases are referred to and discussed by the Calcutta High Court in *Upendra Narain Myti* v. *Gopee Nath Bera*[4] to which Mr. Justice *Prinsep* who was one of the Judges that decided the case of *Radha Churn Dass* v. *Kripa Sindhu Dass*[5] was a party. The Court expressed its dissent from the view expressed in the earlier case, and held that the separation of one member of a joint Hindu family did not necessarily create a separation between the other members nor cause the general disruption of the family, and Mr. Justice *Prinsep* stated that if the judgments of the Privy Council noted above had been brought to his notice on the previous occasion, his judgment then would have been different. Mr. Mayne (para. 451) also takes the same view. [But see the present edition where he takes a different view in the light of the Privy Council decision to be noticed presently—para 492, 7th Ed. In *Sudarsanam Maistry* v. *Narasimhulu Maistry*[6] Sir *V. Bhashyam Aiyangar* J. referred to the previous cases bearing on the question of partial partition and laid down the *dictum* that after such partition the remaining

1. [This raises the question as to the rights of an after born son. There is a considerable conflict among the Sanskrit writers as to the nature and extent of these rights. There is, therefore, not much good in referring to these rights in the solution of the question under consideration :—Ed.]

2. (1846) 4 M. I. A. 137 (168) [where, however, all that was said was that a divison may be either total or partial :—Ed.]

3. (1867) 11 M.I.A. 369 at p. 386.

4. (1883) I.L.R. 9 C. 817.

5. (1879) I. L. R. 5 C. 474.

6. (1901) I. L. R. 25 M. 149.

members continue as an undivided family and not as re-united members. See at pp. 156, 157. But apparently this view cannot be maintained after the decision of the Judicial Committe in *Balabux* v. *Rukhmabai*[1] where the above judgment of *Bhashyam Aiyangar* was cited. Their Lordships observed: "There is no presumption when one co-parcener separates from the others that the latter remain united. In many cases it may be necessary in order to ascertain the share of the out-going member to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all. And their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to re-unite must be proved like any other fact." How far these observations will affect the view taken by the Indian Courts previously is a question for solution hereafter. This much may be stated, that there is no presumption that when one separates the others remain united. There must be an agreement to unite at any rate and this must be proved like any other fact.—ED.]. The status of the family being that of an undivided rather than that of a re-united family [but see the qualification already stated—ED.] the only reason, as far as we can see, which is urged for applying a rule different from the one applicable to an undivided family is, that, otherwise, an equitable partition cannot be effected. Mr. Justice *Innes* gives as an instance the following case. 'A has ten sons and B, his brother, ten sons. If 'nine of A's sons separate leaving A and B with ten sons, then 'there would be twelve persons to share. Would A who at the 'time of the separation of the nine sons was entitled to 'one-tenth of one-half the entire family property or one-twentieth of the whole, be now entitled to no more than one-twelfth of the half or one twenty-fourth?' The arithmetical calculation of the shares is not correct, but it does not affect the line of argument.[2] The property will have to be divided into twenty-two shares out of which the nine sons of A would get nine shares and the remaining thirteen shares would be enjoyed by A and his one undivided son and B and his ten sons. Supposing A and his son wish subsequently to effect a

1. (1903) I.L.R. 30 C. 725 :s. c. L R. 30 I. A. 130.

2. Apparently according to the Privy Council there can only be an agreement to reunite in such a case.

partition with B and his sons, the question is, whether the former [203] are entitled only to two shares out of the thirteen or six and a half shares. The Officiating Chief Justice says that a re-union would not take place on the latter understanding, which would lead to an inequality of apportionment to those entitled to equal shares, and would be in conflict with the rule of Hindu law requiring equality. But as he himself states later on, there is no question of re-union here. Probably a re-union may not take place on such terms and even in the case put forward by the learned Judge, B would not have agreed to remain undivided with A, when his nine sons claimed their shares. It would always be open to B to insist on a complete partition being effected between himself and his brother. The question, however, arises whether in the absence of any such expression of will on the part of B to sever his connection with A, the Court is justified in dealing with the rights of the parties on the basis of the existence of such an expression of will. Both the Judges declare that otherwise there would be an inequality of shares. We do not see our way to accepting this view as correct. There is no inequality in the shares at the time of the second division, because each gets one half of whatever property is left with the family at that moment. It cannot even be positively said that the quantity of the property out of which these equal shares are taken, must necessarily be less at the time of the second division than what it was at the time of the first. It is just possible that owing to the prudent and careful management of the family affairs by the brothers or the managing member, the property at the time of the second division is ten times as large as it was at the time of the first division. Supposing this result was due to the energy of A, what would be the equity of awarding him and his son only two-thirteenths out of the family property and giving the remainder to B and his sons. Or would the Court take an account of the family property as it was at the time of the first division and give effect to this rule of division only in regard to the same and let the brothers have equal shares out of the remaining property? Supposing A had instead of ten sons nine daughters and one son and B one son, the marriage of the nine daughters would be a legitimate charge on the whole family and not merely on the share of A so long as the family is undivided; if subsequent to the marriages A and B effect a partition there can be no doubt *that the principles of equal division of the family property [* 204]

would operate very prejudicially to B's interests and yet the law would give no help in such cases.

It has further to be remembered that the practical carrying out of the rule after an interval of a generation or two from the date of the first partition would be found to be extremely difficult and oftentimes to result in gross injustice being done. After giving our best attention to the subject we find ourselves unable to agree with the Madras High Court in the view that it takes of the subject. It is neither supported by any text of Hindu law, nor by any decided case, nor is it supported by usage so far as we are aware. [But what is the usage ? Is it proved to be otherwise:—Ed.] It is merely a novel extension by the Court of the principle of equal division laid down in the Hindu law books as applicable to cases of partition of family property. In practice the cases would be found to be rare where a person remains undivided with his brothers while his sons are divided from him. Such cases do arise only when a son misbehaves and he is sent away from the family after he is given his share, the family continuing in other respects as before.

A CASE HARDER THAN RUKMABAI'S.

I do not know whether you have any Doctors of Mahommedan law among you at Madras. If there are any, I should like them to say what should be done in the following curious case, which has actually occurred. Khushal and Sidib were two brothers of the Sunni persuasion. The latter had a son Khudabux, the former had a daughter, Panob Khatun. Panob, when yet a minor, was betrothed to Khudabox who had attained maturity. But before they could marry, Khudabox happened to have a row with Khushal; and Khushal was persuaded by a cousin of his—one Choto—to break his promise to Sidib, and marry Panob Khatun in hot haste to Choto's son Ahmad, a boy who was Panob's junior by two years. The marriage was not consummated owing to Ahmad's minority, and Panob continued to live with her father. Shortly after the marriage, a reconciliation was effected between Khudabox and Khushal by their Pir (or spiritual guide), and through this gentleman's influence, and with the sanction of the tribe to which the parties belonged, Choto, on behalf of his minor son Ahmad,
[* 205] *passed a deed whereby in consideration of the abandonment of

certain rights of easement by Khushal and Sidib, he released Panob Khatun from the bonds of marriage. Panob was, thereupon, formally married to Khudabux with great *eclat* and rejoicings. As both she and her husband were adults, the marriage was of course consummated, and she subsequently became the mother of several children. Nine years after this marriage, Ahmad brought a suit against her for restitution of conjugal rights. He also sought an injunction against Khushal and Khudabux. The suit was found to be within the period of limitation. An objection that the suit could not lie as Ahmad had not consummated his marriage was over-ruled on the authority of *Rukmabhai's case*[1] and the only important question, which remained to be disposed of, was whether the father of Ahmad was competent to annul Ahmad's marriage by what is technically called *Khula.*[2] There was no doubt that Ahmad, had he been an adult, could have so annulled his marriage, for "a wife is at liberty with her husband's consent to purchase her freedom from the bonds of marriage" (Macnaghten VII—28). Ahmad had known of the marriage with Khudabux long before his suit. He had also taken no steps immediately on attaining his majority to have it set aside. His suit indeed was barely within time, and the evidence showed that if the rights of easement abandoned by Khushal and Sidib had not been re-asserted, no such suit would have been brought. To hold that the marriage with Khudabux was invalid was to make the innocent issue of the marriage illegitimate, and to force an innocent woman to the bed of a person whom she loathed. To hold on the other hand that it was valid was to lay down that a father could dissolve the marriage of his minor son. This, however, could be no great hardship, as the father had power to create the tie of marriage independently of the wishes of the minor, and might therefore be fairly held by parity of reasoning, competent to destroy it.

There is a passage in the Hidaya which bears on this subject. It is as follows : "If a father transact a *Khula* on the past of his infant daughter for a certain sum engaging to hold himself responsible for the payment, the *Khula* is valid." This same proposition is laid down in Shama Charan's elaborate work, part

1. (1886) I. L. R. 10 B. 301.

2. See Abdur Rahman's Institutes of Mussalman Law, Art. 290.

I, page 432, and in Baillie's Digest, Vol. I, page 319. It might be, therefore, held that Khushal had authority to secure a *Khula* [* 205] for his minor daughter.* Baillie says that the *subsequent* sanction of the girl is sufficient, and in the present case Panob's conduct amounted to such sanction.

Baillie, however, does not lay down the law so clearly as regards *Khula* given by the father of a boy. His words are: "When a father has made a *Khula* for his infant son, *it is not valid without any waiting for the son's sanction.*" What is the meaning of these words? Does Baillie mean that the rule applicable to the girl's father is not applicable to the boy's father? It is a pity that he is not more explicit. The question is one which can only be properly decided by referring to the original work translated by Baillie[1].

Had Ahmad been a Shiah, his father would certainly have had authority to give a *Khula.* The author of the *Hidaya* draws a distinction between ordinary divorce, in which the husband is prohibited from taking anything from his wife, and *Khula*, which he defines as 'exchange of property for the person' (see Hamilton's *Hidaya*, page 113). Shama Charan Sircar, treating of the Imamiya law in Part II of his work, says at page 106: "if *Khula* is considered in the light of a divorce (*Talak*), it is void when entered into by a guardian for his ward; but if *Khula* is not a divorce, it is valid when given by a guardian for something in exchange. Baillie's authorities and the *Hidaya* clearly show that *Khula* is not a divorce.

The parties concerned in this case dealt with poor Panob Khatun as if she had been a chattel. The Mahomedan Law unfortunately establishes an analogy between marriage and a contract of sale, and Khushal and Choto had the approval of their community and their spiritual counsellor in what they did. Ahmad himself showed by his inaction for nearly two years after attaining his majority that he had no objection to the arrangement adopted by his father. He was joint with his father and had enjoyed the full benefit of the consideration given by Khushal and Sidib. To grant him restitution of conjugal rights—or

1. See the explanation of this passage of Baillie as suggested in Art. 292 of Abdur Rahiman's Institutes of Mussalman Law: "In no case can a father consent to Khula repudiation *in the name of* his minor son, nor can the father's ratification render valid a repudiation pronounced by the minor son himself."

rather their institution—would, therefore, appear not only to be against the spirit of Mahomedan Law, but also against equity.

The highest appellate Court here has, however, interpreted the passage cited above from Baillie to mean that a *Khula* by a father on behalf of his minor son is *ab initio* invalid and could not be *subsequently ratified by the son. The result is that Panob's children are found to be illegitimate and she herself has been ordered to render conjugal rights to Ahmad. [* 207]

Shikarpur. DAYARAM GIDUMAL.

MITAKSHARA.

Translator's Note.—Though the next three slokas have no direct bearing on law, they are translated here for the purpose of rendering intelligible the elaborate discussion of the rules of interpretation contained in the commentary to the 81st sloka.

It has been said that women should be enjoyed for the purpose of begetting sons. The author now enters into further particulars.

79. The nights favourable to women for conception are sixteen. He (the husband) shall cohabit on even nights. (So doing) he remains just like a Brahmachari. He shall avoid the parvas and the first four (nights).

Rithu is that season for women which is characterized by fitness for conception. And that (season) is the 16 days and nights beginning from the day on which the menses appear. In such season on even nights—by the use of the word 'night,' the daytime is prohibited—he shall cohabit, *i.e.*, approach (his wife) for begetting sons. The words "*even nights*" are used in the plural to denote the aggregate. And hence even in one and the same season he shall approach on all even nights that are not prohibited. Thus approaching, he is just like a Brahmachari, (*i.e.*, a person who observes continence.[1]) Hence where chastity (continence or sexual purity) is prescribed, as on occasions of Sraddha and the like, the sin of sliding from chastity does not attach to one who (thus) approaches. And, besides, he shall avoid the *parvas* and also the first four (nights). By the use of

1. But see the different meanings of this term according to other commentators: Foot-note to Manu IV, § 128, p. 149 of Vol. XXV of the Sacred Books of the East.

the word *parva* in the plural, and by reason of understanding it conformably to its true or real meaning, the 8th and 14th nights are also included (among the ineligible days). So Manu has said[1] : " A man of the twice-born caste who is a Snataka shall always remain a Brahmachari[2] (*i.e.*, chaste) even during the season (*i.e.*, the period favourable for conception or conjugal intercourse) on the new moon day, on the 8th day, on the full moon
[* 208] day, and on the 14th day." * Hence he shall avoid the new moon and the other days, as well as the four nights commencing from the appearance of menses.

80. Thus once approaching the female in a slender condition, when the moon is favourably situated, the male shall avoid the constellations Magha and Mula and beget a son endowed with good qualities.

Furthermore, approaching the woman in the manner aforesaid, he should see that she is slender. And slenderness exists at the time by reason of the observance (Vratha) prescribed for a woman during menses.[3] But if it does not exist, slenderness should be produced, for the purpose of begetting a son, by spare and non-fatty food, etc., as it is said in the precept [4] " a male child is born, if there is a preponderance of the semen, and a female child is born, if there is a preponderance of the ovum." Even on an *even* night, if there is a preponderance of the ovum, the issue is really female, but with the form of a male. Even on an odd night if there is a preponderance of the semen, the issue is really male but with the form of a female. As time is the efficient cause (of the sex of the issue)[5] and the semen and the

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1. Manu IV. § 128. Sacred Books of the East, Vol. XXV, p. 149.
2. One who has completed his studies and entered the order of house-holder.
3. Vasishta Ch. V, §7. Angirasa, §. 37, 38 and 39.
4. Manu III § 49. Sacred Books of the East, Vol. XXV, p. 84. Paithinasi describes the Vratha thus :—" A woman in menses should have the same wear for the nights ; should not bathe ; nor should bathe in oil ; nor should clip her nails ; nor should twist a rope; nor should clean her teeth; nor should wear a garland of flowers ; nor should use scents ; nor should use things stimulating amorous desires ; nor should drink with the left hand (or with a small vessel)." Vasishta adds (Ch. V, §7) :—"Should sleep on the floor ; should not use collyrium ; should not sleep in day time ; should not touch fire ; should not eat flesh ; should not see the house (*i.e.*, should go out of the house) ; should not laugh ; should not do anything ; should drink water with a big vessel or a copper vessel."
5. Another reading is " as time is not decisive."

ovum are of greater influence being the material cause,[1] she (the wife) should be made slender. He (the husband) shall avoid the Maghâ and Mûla constellations (those nights on which the moon is in them). When the moon is situate in an auspicious position, as the eleventh mansion for instance (he may approach.) From the use of the word *cha* (lit. *and*) it must be inferred that there should also be the advantage of the moon being in stars favourable for the birth of male children, of auspicious Yoga (conjunction of stars) and of auspicious Lagna (the appearance of any particular sign of the zodiac in the horizon). "Once", *i.e.*, on the same night, not twice or thrice (he may approach.) Then he begets a son endued with (good) qualities. "Male", *i. e.*, one who possesses unimpaired virility.

Having thus laid down the (Niyama) rule (to be observed) in season, the author lays down the rule (Niyama) which should obtain out of season.

81. Or remembering the boon granted to women, he shall act according to his wish[2] and be devoted to his wife alone, as it has been said that women should be protected.

*Yathakâmi (according to his wish), *i.e.*, one whose conduct is such as does not go against the wishes of his wife: He shall become (such). The word *Va* (or) is used to denote the adoption of an alternative rule (Niyama), and not to indicate the rejection of the previous alternative rule (Niyama). Remembering the boon granted to women by Indra, namely, "He who disappoints your desire shall be a sinner" as it is said where "They (women) said (to Indra): 'We shall choose a boon. Let us derive issue from our courses. Let us cohabit for pleasure till we give birth.' Therefore, women obtain issue from courses and cohabit for pleasure till they give birth. Thus was their boon chosen.[3]" [* 209]

Besides he shall be devoted to his wife alone; *i. e.*, he shall think solely of her. By the use of the word *eva*, he (the author) causes the prohibition of intercourse with other women from its

1. *That is*, material out of which any thing is made.

2. *That is*, without going against his wife's wish; see commentary below.

3. Yajur Veda Taittriya Samhita Kanda. 2. Prapataka. 5. Anuvaka I. The story is that Indra having become guilty of the murder of Visvarupa, son of Twashta, parted with his sin to the earth, to trees and to women, each of them stipulating for a boon in return. *Vide* Vasishta, Ch. V, §8

being so mentioned in the Prâyaschitta Smriti. The author points out the known advantage in both cases.[1] By reason of the saying "women should be protected," it has been declared that women should be protected. It has been already stated they must be well protected.[2] The protection there referred to is declared here to be by following their inclination and by non-intercourse with other women.

Is the rule "he shall cohabit on even nights in the season"[3] to be regarded as a *vidhi* (*apûrva-vidhi*) or a *niyama* or a *parisankhya*? It will be stated (what it is). It is not a *vidhi*, by reason of the object being attained (even without the rule). Nor is it to be regarded as a *parisankhya*, by reason of three objections attaching to it. Therefore, those who know Nyaya[4] (the *mimamsakas*) have taken (*i. e.*, understood) it to be a *niyama*. What then is the difference between these kinds of rules? A *vidhi* is a rule which inculcates the performance of a thing which otherwise will not at all follow;[5] as, for instance, the rules that "a man shall perform *agnihotra* (oblation to fire): that *ashtakas* (*sraddhas* on *ashtaka* days) shall be performed."

Niyama is a rule which inculcates a particular mode only when otherwise (the thing) might be done in several modes;[6] as, for example, the rule that a man shall sacrifice on even ground.
[*210] By the rule that a man shall perform* the sacrifices **दर्श पूर्णमासा** (sacrifices which ought to be performed on the new moon and the full moon days) sacrifice is enjoined by necessity or obligation (*i.e.*, is imperatively ordained, or as a matter of obligation.) And as it (*i. e.*, sacrifice) cannot be performed except in (or at) some place, (the idea of) place is conveyed by the sense.[7] And place is of two kinds—*even* and *uneven*. When the sacrificer wishes to perform

1 *That is*, in acting according to her wish and in devoting himself to his wife.

2. Yajnavalkya Acharakanda, § 78, p. 121 *supra*.

3. Verse 79 *supra*.

4. The Sanskrit reading is **न्यायविद्‌ः**

5. Lit. a *vidhi* is a rule conveying what (otherwise) is absolutely not conveyed (or not proved.)

6. *That is*, inculcates something which in the absence of the rule will be optional The literal translation of this passage is this :—Niyama is a rule which extends (or applies) what follows in (or according to) one alternative (or case) to what does not follow in (or according to) another alternative (or case) :—ED.

7. Place is implied from the sense.

the sacrifice on *even* ground, the precept that he shall sacrifice on even ground remains neutral or passive (*i. e.*, has not to be resorted to) as the object of the rule has been (naturally) attained. But when he desires to perform it on *uneven* ground, then (the precept) that he shall sacrifice on even ground finds its use, as then (*i. e.*, otherwise) its object would not be accomplished. The rejection of uneven ground is the true object or meaning (of the text) [*i. e.*, is indicated thereby] by reason of the sacrifice being complete (or completed) only by performance at the prescribed place (and by reason of) a sacrifice not being one (ordained to be) performed according to the Sastra by (its) performance at a place not prescribed . Similarly, (there is the rule that) a man shall eat his food facing the east. This illustration from the Smriti is explained by what has been said already.

Where a single rule or thing finds scope in various matters the reiteration of it with reference to some one matter for the purpose of excepting its application to others, is said to be *parisankhya*; as, for example, the mantra (in the passage[2]) "He should take the rope (or halter) of the horse by pronouncing (the mantra); 'they took this rope (on the post) of the sacrifice'" is by its own, force[3] applied to the taking of a rope which may be the halter both of a horse and of an ass.[4] By the rule that "he should take the halter of a horse" while it (mantra) is being again applied to the halter of a horse it is excepted from the halter of the ass). So also the rule that "five five-clawed animals are to be used for food." Here it follows that the hare and the other (like) animals as well as the dog, and other (like) animals, may be used as food according to one's own desire. But the mention again of the hare, and other like animals excludes dogs, and other like animals (from the class of eatable things). What then is the proper construction in the present case? It is declared to be *parisankhya*. As the approaching of his wife during season is a thing natural to a married man, it is not a proper subject for *vidhi*. Nor is it a subject for *niyama*, because of the conflict

1. The rejection of *uneven* ground is the true object of the text, as a sacrifice is complete only by performance at the prescribed place and is not performed according to Shastra if it is performed at a place not ordained.

2. Yajur-Veda, Taitteriya Samhita Kanda 5, Prapataka 1, Anuvaka 2.

3. *i.e.*, by force of its literal meaning.

4. In the performance of a sacrifice.

with the *Grihya Smritis* (*i.e.*, Smritis bearing on domestic duties.) The *Grihyakaras*[1] have laid down thus :—"After marriage a man shall be chaste for three nights, or twelve nights, or for one year."[2]

In this connection if before the twelve nights or (before) the year, the monthly course (or season) occurs (or approaches) by
[* 211] (holding)* that it is a *niyama* to approach the wife during season, the precept as to chastity will be defeated. Besides, when the obvious import (or the inherent meaning) is (naturally) attainable, it is proper to construe the passage[3] as invested with a special attribute or quality. As the approaching of one's wife during season is only a matter of natural inclination, the proper explanation of the text is that if a man approaches his wife *at all*, he shall do so *only* during season.

Again, as even from the *naiyamika* precept for the procreation of children, intercourse during season necessarily (not optionally) follows,[5] a *niyama* that a man shall approach his wife during season would be needless or meaningless.

Again, in a *Niyama*, an *Adrishtam*[6] has to be devised[7]. Further, if it is a *Niyama* that (she) wife has truly to be approached, during season, an impossible thing is prescribed[8] in the case of one who is at a distance, of one who is disabled by illness, and other like (cause) and of one who is without (sexual) desire.

Then again in a *Niyama* there is inconsistency of there being both[9] a *vidhi*[10] and an *anuvada*.[11] Thus the same word

1. Writers on Grihya or domestic duties.

2. Aswalayana Grihya Sutra 1, 8, 11 and 12.

3. तस्मान्युग्मासु शंविशेत्

4. It is proper to regard the passage (or text) as peculiarly relating to a special matter or limited to that which is specially enumerated.

5. Is to be implied as an obligatory (and not optional) act.

6. A mysterious, unseen, intermediary agency between the action and its fruit.

7. No such unforeseen agency has to be devised here :—ED.

8. An impossible or impracticable sense (or object) is indicated :—ED.

9. There is the inconsistency of the same text having to be construed both as a *vidhi* and as an *anuvada* :—ED.

10. The injunction that the wife shall be approached in season.

11. Explanatory repetition or reference to what is already mentioned, *i.e.*, that which explains the vidhi or injunction (here, intercourse with wife.)

pronounced once in one alternative reiterates by way of explanation what has been already established, and in the other alternative enjoins or lays down an injunction. Therefore, it is proper to regard the rule a man shall go to his wife during the season *only* and not on other occasions, as a *parisankhya.*

But Bharuchi, Viswarupa and others do not approve of this view, as (according to them) it is proper to regard it (*viz.* the rule) as a *niyama* only by reason of the fact that in order to carry out its own object or aim (*viz.*, intercourse) it has in one alternative (at any rate) to operate as a *vidhi* and also by reason of the fact that it declares non-approach (non-intercourse) as sinful. Thus: "He who, being in the proximity of a wife who has bathed after the monthly course, does not approach her, incurs the dreadful sin of fœticide and there is no doubt about it[1]."

Nor is there the inconsistency of the same text being both a *vidhi* and an *anuvâda*,[2] as there is no *anuvâda* (here) and as the text signifies a *vidhi.* The objection that it (the same text) is *both* a *vidhi* and *anuvâda* arises (or applies) where for the purpose of limiting (or placing a limitation upon) what ought to be enjoined or prescribed, the same text is repeated (or again expounded) or explained (*i.e.*, is treated as an *anuvâda)* and is also prescribed (as a *vidhi*) (with reference to some other purpose) in respect of a matter not already prescribed (*i.e.*, with reference to something which cannot happen independently of the text). Thus in the objector's argument (literally, the first part of the argument) in the *sruti* or topic relaing to the *vâjapêya* sacrifice (in *mimâmsâ*) where the text is (or runs) : "One desirous of the Kingdom of Heaven shall perform the *vâjapêya* sacrifice." the (injunction as to the performance of the) sacrifice is repeated (or expounded again) for the purpose of limiting that which is ordained as the distinctive attributes of a *vâjapêya* sacrifice. The same (*i. e.*, the performance of sacrifice) is inculcated (*i.e.*, treated) as a *vidhi* in relation to (the resulting) attribute (in the attainment) of the Kingdom of Heaven.

*Here (in the case under discussion) an *anuvâda* is not proper. As for the statement that in the case of a *niyama* an [* 212]

1. Parasara IV § 12.

2. *That is*, the objection that the same text has to be regarded both as a *vidhi* and as an *anuvada*.

adrishtam[1] has to be assumed, it applies equally even in (the view that the text is) a *parisankhya*, as sin is attached to one who approaches out of season.[2] As for the objection that the text is not a *niyama*, as non-optional intercourse during season is established by the mere consideration of the rule for procreation of sons being a *niyama*,—that objection (or argument) is frivolous (or fallacious). Let it be granted that the very rule as to procreation of sons is a *niyama*. The statement that in the text: "thus approaching the wife in slender condition, he shall beget a son endowed with good qualities"[3] the rule inculcates the procreation of sons independent of intercourse with a woman is not (sustainable). To the same efficient cause, *bhâvana*, which has *intercourse* as the means or instrument (*karanika*). *procreation of sons* is observed as the object of the act (*karmatâ*)[4] by reason of the passage: "thus approaching, he shall procreate a son endowed with good qualities[3]" as in the example: "a man performing the *agnihotra* sacrifice shall attain Heaven."

Nor is there any chance of its being an impossible rule in the case of persons who are not near, &c., because the rule is prescribed only for men who are near and who are able, by reason of the peculiarity stated in the rules—"he who being near his wife who has bathed after menses does not approach her,[5]" and "he who being *healthy* does not approach his wife who has bathed after menses." Absence of desire is also *obviated* by making the rule a *niyama*. It is not proper to construe the passage (containing the injunction) as invested with a special attribute (*visêsha*) (*i.e.*, as laying down qualifications) as in the case (where intercourse does not happen independently of the text) an injunction (*vidhi*) becomes necessary to effectuate the intended object (or inherent meaning of the rule). There is no conflict with the Grihya Smritis either. If the menses appear before the completion of one year, the sin of deviating from chastity (celibacy) does not attach to one who approaches as (it does not) on occasions of *sraddhas*, &c.

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1. A mysterious, unseen, intermediary agency between the action and its fruit.
2. Because here too, the connection between the act and its consequence is unseen
3. Yâjnawalkya § 80, *supra*.
4. *I. e.*, By the passage "thus approaching, &c." procreation of sons is prescribed as the object and intercourse is both the act or cause and the means :—ED.
5. Parasara IV, § 14.

Therefore, it is not proper to take the text as a *parisankhya*, liable as it is to three kinds of objections, *viz.*, abandonment of (*i.e.*, violence to) the literal meaning (of the text), the assumption of a different (or another) meaning, and the annulment (or contradiction) of what is established by another *pramana* (or rule).[1]

With regard to the rule that * "five five-clawed animals be eaten", it may be said that the rule is a *niyama* with reference to the eating of hares and the like, as in a case where it is not established (by *pramana*, *i.e.*, when there is no desire) and it may also be taken as a *parisankhya* with reference to the eating of hares and the like and with reference to the eating of dogs and the like as in a case where it is established by *pramana* (*i.e.*, where there is desire). Thus it is both a *niyama* and a *parisankhya.*[2] Nevertheless (although it may be so) in the view of the text being a *niyama*, there would be sin in not eating hares and the like, and no sin in eating dogs and the like. As this is opposed to the Smritis relating to expiation the text should be taken only as a *parisankhya.* Thus the rule in the text[3], "that meals are prescribed by the Smriti for the twice-born in the morning and in the evening" has been explained as a *niyama*. If it were a *parisankhya* then the rule "they should not eat in the interval" will be superfluous.[4] [* 213]

The text in question being thus a *niyama*, it should be taken to mean *in every season*, by reason of the maxim that when the cause (*nimitta*) recurs, that which is produced by or connected with it (*naimittika*) also recurs.

The rule that "a man should act according to his wish[5]" (*i.e.*, without going against the wishes of his wife) is also a *niyama*. Even out of season, if the wife desires, he shall gratify her. The

1. In the present case for instance, by restraining natural inclination.

2. It is a *niyama* where it applies to the animals enumerated in the text. It is a *parisankhya* where it extends both to the animals enumerated and to those not mentioned :—ED.

3. [This is ascribed to Manu by Haradatta Misra in his commentary named Ujjvala on Apastamba Dharma Sutra but is not to be found in any published edition of Manu. The text is found in Harita, Ch. IV § 69 :—ED].

4. [The author of Ujjvala regards it as a *parisankhya* :—ED.]

5. Yâjnawalkya § 81, *supra*.

two rules of Gautama[1] "that a man shall resort during season" or "that he shall resort on all but forbidden days" are also *niyamas.* A man shall resort during season and when his wife desires, out of season also, on all but forbidden days. It is needless to dilate further on the subject.

CRITICAL NOTES.

Ramabhadra Razu *v.* Jegannatha Razu.—1 M. L. J. 171—I. L. R. 14 M. 328.—In this case the Madras High Court consisting of *Muthusami Ayyar* and *Weir*, JJ. held that where a suit is brought for possession of immovable property and *subsequent mesne* profits, and the decree giving possession is silent about the *mesne* profits, a fresh suit will not lie for the *mesne* profits between the institution of the first suit and the decree, though it does lie for *mesne* profits for the period subsequent to the first decree. This decision is at variance with that of the Calcutta High Court in *Mon Mohun Sirkar* v. *The Secretary of State for India in Council*[2] where *O' Kinealy* and *Ameer Ali*, JJ. held that a fresh suit lay for the whole *mesne* profits after the institution of the first suit, when they had not been dealt with by the former decree. First, it is difficult to understand the distinction drawn by the Madras High Court between *mesne* profits due for the period *subsequent to the first decree* and the profits due between the institution of the suit and the decree therein,[3] but we shall deal with this later on. It is clear that if the first suit
[* 214] contained* no prayer for subsequent *mesne* profits. S. 13 is not a bar to a fresh suit for their recovery, Nor is S. 244 an impediment if the decree does not deal with them by virtue of the powers conferred by S. 211; because the last clause but one in S. 244 provides that nothing in the section shall be deemed to bar a separate suit for *mesne* profits accruing between the institution of the suit and the execution of the decree therein. Even before the enactment of this clause by Act X of 1877 the law was the same, for S. 11 of Act XXIII of 1861, which corresponded to the preceding portion of S. 244, was construed by all the High Courts and by the Privy Council not to preclude their recovery by fresh

1. Gautama Sutras V, § 1 and 2.
2. (1890) I. L. R. 17 C. 968.
3. [This distinction is now unsustainable after the Full Bench decision in *Kuppusamy Aiyer* v. *Venkataramier* (1903) 15 M. L. J. R. 462. ED.]

suit when the decree in the first case did not deal with them.—*Pratapchandra Burua* v. *Rani Swarnamoyi*[1], *Radhabai* v. *Radhabai*[2], *Subbu Vencataramaiyan* v. *Subraya Aiyan*[3], and *Sadasiva Pillai* v. *Ramalinga Pillai*[4]. It is equally clear that where the decree has dealt with subsequent *mesne* profits whether prayed for or not, by allowing or refusing them under S. 211, the effect of Ss. 211 and 244 and of S. 13, will be to preclude a fresh suit for their recovery—*Sitaram Amrit* v. *Bhagvant Jagannath*[5].

The question remains as to whether a fresh suit for *mesne* profits due between the institution of the first suit and the recovery of possession, and prayed for in it, is maintainable when the former decree was silent about them. S. 244 has no application because the decree has not dealt with them. It is argued by the Madras High Court that the *mesne* profits having been prayed for, Explanation 3 to S. 13 operates to make the silence of the decree amount to a disallowance of the claim. No such construction could be put on the silence of the decree before the enactment of Explanation 3—see *Gauri Baijnath Prasad* v. *Budhu Singh* [6] Does the addition of this clause make any difference? S. 13 applies, we conceive, to a cause of action or a claim which had accrued to the plaintiff at the date of plaint. It cannot be said that the plaintiff is entitled at the date of plaint to *mesne* profits which accrue subsequent to it. The plaintiff has no cause of action in respect of them, or at all events, assuming the cause of action to be the same he is not entitled to make the claim. Under S. 13 of the Code it is only with respect to claims or causes of action which he is entitled to, and does, set up that the bar of *res judicata* arises. S. 211, C. P. C., gives to the Court an extraordinary power to deal with subsequent *mesne* profits which it would otherwise not have, and the bar to a fresh suit in respect of such profits allowed or disallowed expressly arises by force of that section coupled with S. 13. If S. 211 and the allied clause in S. 244 did not exist, the Court would have no jurisdiction to deal with subsequent *mesne* profits and the bar of *res judicata* could not arise under S. 13. Where the Court states expressly that it does not choose to exercise the discretion conferred by S. 211, no such bar

1. (1869) 4 B. L. R. F. B. 113.
2. (1867) 4 Bom H. C, A. C. J. 181 (F. B.
3. (1869) 4 M. H. C. 257.
4. (1875) L. R. 2 I. A. 219.
5. (1869) 6 B. H. C. A. C. J. 109.
6. (1868) 2 B. L. R.S.N. 16.

under S. 13 can arise. And the silence of the Court or the decree cannot amount to anything more than that the Court has not chosen to exercise the power.

Again, if we look at S. 209, C. P. C., an argument arises from [* 215] the analogy* of a claim for interest on a bond subsequent to suit. Before Act VII of 1888, it had been decided in India and by the Privy Council that a fresh suit for interest or damages for the period between the decree in a suit on a bond and the execution of it, was maintainable—*Seth Gokul Dass Gopal Dass* v. *Murli and Zalim.* [1] That Act now provides, by S. 20, that when the decree is silent with respect to such interest no fresh suit will lie. The addition of this clause to S. 209 broadly declaring in terms that the silence of the decree shall in all cases amount to disallowance of interest indicates that the Legislature thought that S. 13, Exp. 3, could have no application to cases where subsequent interest was prayed for in the plaint and the decree was silent about them. It follows from this that S. 13 can have no application either to the case of subsequent *mesne* profits not dealt with by the decree.

It seems anyhow difficult to understand the reasoning of the Judges when they distinguish the claim to profits prior to decree from that for the profits subsequent to it. If their Lordships are right in holding that S. 13, Exp. 3, applies, the silence of the decree with respect to the entire claim for subsequent *mesne* profits must amount to a disallowance of them *in toto*, and if they are so disallowed, no subsequent suit lies for their recovery. It seems impossible to resist the suspicion that a feeling of sympathy for the rightful claimant has led their Lordships into inconsistency of reasoning. Even the process which their Lordships recommend of inserting in the decree the words " subsequent *mesne* profits refused" cannot limit the disallowance to the profits due up to decree. For the words to be inserted must have reference to the relief claimed, and if the relief claimed in the plaint was subsequent *mesne* profits up to date of possession, the words to be inserted in the decree having regard to S. 13, Exp. 3 (assuming that it applies) must be "subsequent *mesne* profits up to date of possession refused." [The distinction taken in this case between mesne profits subsequent to suit and prior to decree and mesne profits subsequent to decree has been rightly held to be unsustainable

1. (1878) I. L. R. 3 C. 62.

on principle in a recent Full Bench case. In *Kuppusamy Aiyar* v. *Venkataramier* [1] it was held by a Full Bench of the Madras High Court that the words "relief claimed" in the plaint in Exp. III. to S. 13, Civil Procedure Code, meant only relief which, assuming the defence fails, the plaintiff was "entitled to as of right." In that case it was held that where a person brought a suit for possession and for mesne profits from date of suit and failed and on appeal reserved his claim for future mesne profits for a separate suit a second suit by him for such mesne profits was neither barred by *res judicata* nor by S. 373, Civil Procedure Code. It is satisfactory to note that there is upon this point a consensus of view in all the High Courts. For Allahabad, see the case of *Ram Dayal* v. *Madan Mohan Lal* [2]; for Bombay, the cases of *Bhivrav* v. *Sitaram* [3], *Kacha* v. *Lakshmansing* [4]; and for Calcutta *Hays* v. *Padmanand Singh.* [5] :—Ed.]

Muthia *v.* **Appasami.**—I. L. R. 13 M. 504.—In this case the Madras High Court (*Muthusami Iyer* and *Best* JJ.) held that where an application was made by an assignee-decree-holder who was also the auction-purchaser in execution, for delivery of the property from the judgment-debtor and refused by the Court of first instance, an appeal lay, as it was a question relating to the execution of the decree within the meaning of the clause in S. 244, Civil Procedure Code. This decision appears to us open to question. If the purchaser be a stranger, no appeal lies as he is not a party to the suit as required by S. 244. But though in the case before their Lordships the decree-holder himself was the purchaser, [6] as the decree had been completely executed by the sale of the judgment-debtor's property and the satisfaction of the decree, we conceive the Court was *functus officio* [7] so far as the execution of the decree was concerned except when the proceedings are re-opened for a valid reason. The mere fact that the Civil Procedure Code contains provisions for enabling the purchaser to realize his rights under the purchase, and that they are contained

1. (1903) 15 M.L. J. R. 462.
2. (1899) I. L. R. 21 A. 425
3. (1894) I. L. R. 19 B. 532.
4. (1900) I. L. R. 25. B. 115.
5. (1903) I. L. R. 32 C. 118.
6. Even a purchaser from a decree-holder is a "representative" within the meaning of S. 244, C.P.C. See *Sandhu Taraganar* v. *Hussain Sahib* (1904) I.L.R. 26 M. 87, 89. Ed.
7. The theory that the Court would be *functus officio* the moment satisfaction was entered must be accepted *cum grano salis*.

in the chapter on execution of decrees, cannot make the questions arising between the purchaser *qua* purchaser and the judgment-debtor relate to the *execution* of the decree. The application of
[* 216] the purchaser whether* under S. 318 or S. 334 is on the basis of rights accruing on a valid execution and cannot be a proceeding in execution. Proceedings in execution terminate with the realization by the decree-holder, under process of Court, of the benefits due to him under the decree. The application of the purchaser for delivery of the property is not a link in the chain of proceedings necessary for the satisfaction of the decree. The purchaser may wait for two years after complete satisfaction of the decree before he applies for delivery, and how can such an application, even though it may be made by the decree-holder as purchaser, relate to execution ? To put a somewhat analogous case : If an adjustment of a money-decree by the sale of the judgment-debtor's property to the decree-holder is certified under S. 258, all proceedings consequent upon the decree must cease. And an application by the latter for delivery of the property purchased will not be a proceeding in execution.

It has been held that the procedure prescribed by S. 318 is a cumulative remedy to the purchaser—see *Kishor Mohun* v. *Chunder Natha.*[1] If a purchaser can recover possession from the judgment-debtor by *regular suit*[2] in addition to the special procedure under S. 318, why should the decree-holder, if he happens to be the purchaser, lose that right as the owner of the property purchased? For the consequence of holding his application for delivery to be a question falling within S. 244, is to deny him that remedy. The learned Judges in coming to this conclusion rely upon the authority of two earlier Madras decisions — *Vira Raghava* v. *Venkata*[3] and *Vallabhan* v. *Pangunni.*[4] The first was a case in which the judgment-debtor sued to set aside a sale on the ground of the decree-holder's fraud in bringing about the sale and the Court (*Turner* C. J. and *Innes* J.) held that it was a

[It cannot cease when the decree-holder questions the validity or reality of the adjustment and applies for execution. The same principle will apply where the judgment-debtor questions the validity or reality. In the former case there is a question relating to the discharge or satisfaction and to execution, while in the latter case there is a question relating to discharge or satisfaction only :—ED.]

1. (1887) I. L. R. 14 C. 644.
2. But see *Kasinath* v. *Uthumansa* (1901) I. L. R. 25 M. 529, ED.
3. (1882) I. L. R. 5 M. 217.
4. (1889) I. L. R. 12 M. 454.

matter relating to execution and could not be agitated by a fresh suit between the parties; see *Ballodeb Lall Bhagat* v. *Anadi Mahaputter* [1]; *Chintaman Rao Natu* v. *Vithabai* [2]; *Brojo Gopal Sirkar* v. *Buzir-un-nissa Bibi* [3]; and *Mahendra Narain Chaturaj* v. *Gopal Mondul* [4]—but see the dissenting judgment of *Ghose* J. We do not think that these cases support the decision under consideration. Even though a sale has taken place, any application which seeks to re-open the sale and the propriety of the execution, raises a question relating to execution. The judges who decided the case of *Vira Raghava* v. *Venkata* [5] merely held that because the judgment-debtor was at liberty to re-open the proceedings in execution on the ground of fraud, he should not be permitted to do so by fresh suit. Nor can we accept the case of *Vallabhan* v. *Pangunni* [6] as an authority for the principle now laid down. In that case *Collins* C. J. and *Parker* J. held that a petition by a judgment-debtor to recover from the decree-holder the difference between his bid for which the property was first knocked down, and the amount realized by the re-sale on his default to pay the deposit, raised a question relating to execution within the meaning of S. 244. Supposing this decision to be correct, it proceeds upon the principle that the attempt to recover that difference which would have gone towards reducing the amount payable under the decree *pro tanto* was a matter relating *to the execution or satisfaction of the decree. Perhaps it may [*217] also be sought to be supported by the last clause of S. 293, as to which see *Baijnath Saha* v. *Moheep Narain Singh.* [7] But this does not warrant the conclusion that a proceeding based upon the validity of a completed execution, for realising the benefit of substantive rights which accrue therefrom, as in the case of the purchaser seeking delivery, is one relating to execution.

In the case of *Ramanadan Chetti* v. *Kunnappu Chetti* [8] the Madras High Court held that when one of two decree-holders purchased the property of the judgment-debtor in execution and certified satisfaction on behalf of both with the other's consent, the latter could not recover his share of the decree amount

1 (1884) I. L. R. 10 C. 410.
2. (1887) I. L. R. 11 B. 588.
3. (1884) I. L. R. 15 C. 179.
4. (1890) I. L. R. 17 C. 769.
5. (1882) I. L. R. 5 M. 217.
6. (1889) I. L. R. 12 M. 454.
7. (1889) I. L. R. 16 C. 535.
8. (1871) 6 M. H. C. 304.

in execution under S. 11 of Act XXVII of 1861, on the principle that the decree had been executed and this was not a proceeding relating to execution. A separate suit was, therefore, allowed. The Court, holding that a question between the decree-holders was one between the parties to the suit, based their decision that a separate suit was sustainable, on the mere ground that S. 11 of Act XXIII of 1861 did not apply as the matter did not relate to execution. We think that this decision which was not cited to their Lordships in the case under notice lays down the right principle. The same principle has also been emphasised by *Mahmood* J. in *Ramchhaibar Misr* v. *Bechu Bhagat*[1] who held that no appeal lay from an order against an application to set aside a sale on the ground that the property was not saleable in execution. In a recent case—*Huragobind Das Koiburto* v. *Issure Dasi*[2]—*Pigot* J., referring to the words "relating to execution" in S. 244, said that the question there was not "in respect to the furtherance of or hindrance to, or the manner of carrying out, the execution of the decree." We, therefore, think that the application for delivery of property from the judgment-debtor by the decree-holder as purchaser, is not a question relating to the execution of the decree.

[On the question whether an auction-purchaser is a representative for the purposes of S. 244 (present S. 47, C. P. C.) there seems to be a difference of opinion. A decree-holder who has purchased at auction has been held to be a party and to come within the scope of S. 244—see *Kasinatha Ayyar* v. *Uthumansa*[3]. Where the auction-purchaser is a stranger, it is still a moot question whether he can be regarded as a representative of any of the parties to the suit. A distinction has to be drawn between a purchaser in execution of a mortgage-decree and a purchaser in execution of a money-decree. In the former case, he is regarded as a representative of the judgment-creditor—see *Kasinatha Ayyar* v. *Uthumansa*[3]. The distinction, however, has not been always kept in sight, and in some of the cases it has been held that an auction-purchaser in execution of a money-decree is also a representative coming within the scope of S. 47—see *Sandhu Taraganar* v. *Hussain Sahib*[4]; *Manika Odayan* v. *Rajagopala*

1. (1885) I.L.R. 7 A. 641
2. (1887) I L.R. 15 C. 181.
3. (1901) I.L.R. 25 M. 529 (532).
4. (1904) I.L.R. 28 M 87.

Pillai.[1] Doubt, however, has been thrown upon this latter decision and the real point decided in the former explained in the recent case of *Krishna Satapasti* v. *Surasvatula Sambasiva Row.*[2] But even assuming that he is a representative of a party the further question arises whether proceedings taken by a purchaser to obtain possession can be regarded as coming within the scope of S. 244 as being proceedings relating to the execution, discharge or satisfaction of the decree. The High Court of Madras has repeatedly held that they were bound by prior decisions to hold that such proceedings were proceedings in execution and related to execution. See *Kattayat Pathumayi* v. *Raman Menon*[3] ; and *Sandhu Tarunganar* v. *Hussain Saib*[6], and for other earlier decisions see *Lakshmanan Chettiar* v. *Kannammal*[4] and *Kasinatha Ayyar* v. *Uthumansa Rowthan.*[5] The same view has been taken by the Calcutta High Court—see *Madhusudan Das* v. *Govinda Priya Chowdhurani*[6] ; but see, however, *Sultan Sahib Marakayar* v. *Chidambaram Chettiar*[7] where it has been held that an application under S. 318, C P.C., by a decree-holder purchaser was not an application in execution—ED.]

NOTES OF INDIAN CASES.*

Shib Singh *v.* **Sita Ram**—I.L.R. 13 A. 76.—A creditor [*248]
may sue for a debt, which is under attachment at the instance of a stranger, and S. 268 (*a*), Civil Procedure Code, prohibits only its *recovery* and not the institution of a suit for recovery of the same.

Semble.—An order of attachment under S. 268 is not an injunction, or order staying a suit under S. 15 of the Limitation Act.

[This decision is approved by the Judicial Committee in the case of *Beti Maharani* v. *The Collector of Etawah*[8] which was a case under S. 485. The Judicial Committee hold that the same rule which applies to attachment after decree (S. 268, C. P. C.) must also apply to all attachments :—ED.]

Sohua v. **Khalak Singh**—I.L.R. 13 A. 78.—An appellate Court may *at any time* order under S. 559, Civil Procedure Code,

1. (1907) I.L.R. 30 M. 507.
2. (1908) I.L.R. 31 M. 177.
3. (1902) I.L R. 26 M. 740 (741).
4. (1900) I.L.R. 24 M. 185.
5. (1901) I.L.R. 25 M. 5296
6. (1899) I.L.R. 27 C. 34.
7. (1909) I. L. R. 32 M. 136.
8. (1894) I. L. R. 17 A. 198 (P. C.) which was an appeal from the decision in *The Collector of Etawah* v. *Beti Mahanam* (1892) I. L. R. 14 A. 162.

that a person who was a party in the original Court but not impleaded in appeal when it was filed, be made a respondent, and such power is not affected by the Limitation Act, even though the order may be made by the Court not of its own motion but *on the application of any person*—*Manickya Moyee* v. *Boroda Prosad Mookerjee* [1] and *The Oriental Bank Corporation* v. *Charriol* [2] *Ranjit Singh* v *Sheoprasad Ram* [3] dissented from. Under the section, the Court may make a person respondent, even though he was arrayed on the same side with the appellant in the original suit.

[See also *Bindeshri Naik* v. *Ganga Saram Sahu* [4]; *Imamuddin* v. *Liladhar* [5]; *Pratap Narain Singh* v. *Rudra Narain Singh* [6]; *Guruvappa* v. *Dattatraya* [7]; *Grish Chunder* v. *Dwarga Nath* [8]; *Fakesa Pasban* v. *Bibi Azim-un-nissa* [9]; *Pearmohun Mukerjee* v. *Naraindra.* [10] :—ED.)

Abdul Majid v. Muhammad Faizullah—I. L. R. 13 A. 89.—A deed of assignment of a decree for sale of hypothecated immoveable property is not a document which comprises immoveable property under S. 49 of the Registration Act, as such a decree does not come within the definition of immoveable property under S. 3.

2. Though a person cannot *prove* his title if the deed is unregistered, yet he can take title under it.

3. An application for execution, by the assignee of the decree, is a step in aid of execution under Art. 179, Cl. 4, of Sch. II, and as such gives a fresh starting point for purposes of limitation ; though, at the date of the application, the deed of assignment not being registered, the assignee was not able to *prove* his title, the defect is cured by subsequent registration, which makes the document relate back to the date of its execution.

4. On an application for adjournment and return of the deed of assignment for getting it registered, an order was made

1. (1882) I.L.R. 9 C. 355.
2. (1886) I.L. R. 12 C. 642.
3. (1879) I.L.R. 9 A. 487
4. (1892) I.L.R. 14 A. 155.
5. (1892) I.L.R. 14 A. 524.
6. (1904) I.L.R. 26 A. 528 1 s.c.; A. L. J. 543
7. (1903) I.L.R 28 B. 11.
8. (1897) I.L R. 24 C. 640.
9. (1899) I.L.R. 27 C. 540.
10. (1905) I.L.R. 32 C. 582.

that the *case be struck off for the present.* Such an order means, not that the application is dismissed, but that it shall stand over for the present.

Pirbhu Narain Singh *v.* **Sita Ram**—I.L.R. 13 A. 94.—In a suit for redemption by a mortgagor, who alleged that the mortgage amount had been paid, redemption was decreed on condition the mortgagor paid a certain sum* to the mortgagee. [*249]

On appeal by the mortgagor, *Held*, that S. 7, Cl. 9, of Act VII of 1870 applied as regards the court fee payable, and the same should be computed according to the principal sum secured by the mortgage instrument and not according to the sum which either party may allege to be due; *Edge* C. J. *Obiter*, but in a case where the appeal is by the mortgagee, claiming a larger amount than was decreed, the court fee should be computed according to the difference between the decree amount and the amount alleged by the appellant to be due.

[In a later case, the Allahabad Court dissented from the ruling on the former point and held that S. 7, Sub-sec. 9, applied only to a suit and not to an appeal, and that, therefore, court fee need be paid only on the subject-matter in dispute in appeal—see Sch. I, Court Fees Act; *Nepal Rai* v. *Debi Prasad* [1]. This principle has been accepted by a recent decision of the Madras High Court—see *Reference under the Court Fees Act* [2]—which dissented from the decision of the Bombay High Court in *Umarkhan* v. *Mahomed Khan* [3] and distinguished an earlier ruling of the Madras Court in *Reference under the Court-Fees Act S.* 5 [4].—ED].

Jawarti *v.* **H. A. Emile**—I. L. R. 13 A. 98.—When once a certain amount of damages was awarded, and a mandatory injunction was granted, directing a trespasser who built a wall on another's land, to demolish the same, a fresh suit will not lie for damages for non-compliance with the mandatory injunction, to compel the performance of which, plaintiff has his remedy in execution. The mere fact that people have been afraid to take

1. (1905) I. L. R. 27 A. 447.
2. (1905) I. L. R. 29 M. 367.
3. (1885) I. L. R. 10 B. 41 (45).
4. (1891) I. L. R. 14 M. 480. *Quære*, whether it is really distinguishable. The judgment speaks of institution fee for suit but the actual question was as to the proper fee for an appeal though the reference was as to the institution fee for suit.

rooms in plaintiff's house, fearing that some injury might happen to them is no fresh cause of action—*Darley Main Colliery Company* v. *Mitchell*[1] distinguished.

Ramzan v. Gerard.—I. L.R. 13 A. 100.—A surety under S. 336, Code of Civil Procedure, for the judgment-debtor's appearance when the Court wants him and is applying for being declared an insolvent, is discharged as soon as the petition under S. 344 is filed, though the petition has not been disposed of.—*Koylash Chandrashapa* v. *Christophoridi*[2] followed. [See also upon this point *Janki Das* v. *Ram Partab*[3]; *Dwarka Das* v. *Isabhai*[4], *Imbichunni Nayar* v. *Lalji Ram*[5]; *Krishna Iyer* v. *Krishnasamy*[6]; and also *Krishnan Nair* v. *Ittinan Nair*[7]:—Ed].

Jogendro Bhupati Huorrchandra Mahapatra v. Nityanand Man Sing.—I.L.R. 18 C. 157: L. R. 17 I. A. 128.—The Privy Council *held* that an illegitimate brother was entitled to succeed to an ancestral Raj by right of survivorship to his legitimate brother though the latter has left behind him 3 widows and a daughter The fact of an estate being impartible does not affect the rule of successions—see 1 M. L. J. 5.

Madho Parshad v. Mehrban Singh.—I.L.R. 18 C. 157: L. R. 17 I. A. 194.—The Privy Council *held*, that according to the Mitakshara Law as administered in Bengal (1) an undivided member cannot alienate his share without the consent of his co-parceners, or without necessity; (2) that when the alienation is *set aside at the instance of a co-parcener*, the money paid by the alienee does not form an equitable charge upon the share disposed of, though it *might* be a charge upon it if the alienor were alive.—*Mahabeer Persad* v. *Ramyad*,[8] distinguished. The present decision of the Privy Council leaves the course of decisions in the other provinces unaffected. [See for the law of Bengal and the United Provinces *Balgobind Das* v. *Narain Lal*[9] and *Bhagirathimisr* v. *Sheobhik*[10], and for the law in Bombay and Madras *Gurlingappa* v. *Nandapa*[11] and per *Bhashyam Aiyangar* J. in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*[12]:—Ed.]

1. (1886) L. R. 11 A. C. 127.
2. (1887) I. L. R. 15 C. 171.
3. (1193) I. L R 16 A. 37
4. (1874) I. L R 19 B. 240
5. (1902) I. L. R 24 M 560.
6. (1902) I. L. R. 26 M. 366.
7. (1901) I. L. R. 24 M. 637
8. (1873 12 B. L. R. 90.
9. (1893) I. L. R. 15 A 339: s.c. L.R. 20 I. A. 116
10. (1898) I L. R 20 A. 325.
11. (1896) I. L. R. 21 B 797 at p. 802
12. (1902) I. L. R. 25 M. 690 at pp. 704, 705, 706, 711, 712

Kishen Pershad Pandey *v.* Tiluckbhari Lall.—I. L. R. 18 C. 182.—Where an order is made by a Judge in the Privy Council department refusing to extend the time prescribed by law within which an appellant is required to furnish security for the costs of the respondent, and directing the appeal to be struck off by reason of such security not having been given within the prescribed time, *held* that the order is not a 'judgment' within the meaning of Cl. 15 of the Letters Patent of 1865 and no appeal lies therefrom.* It is only when an order decides finally any [*250]
question at issue in the case, or the rights of any of the parties to the suit, that it is a judgment under Cl. 15 of the Letters Patent, and is appealable, not otherwise.

[The same view was taken by the Calcutta Court in *Gobinda Lal Das* v. *Shiba Das*[1] where it was held that an order refusing to enlarge the time for preferring an appeal already time-barred was not a judgment within the meaning of Cl. 15 of the Letters Patent. In *Chundi Dutt* v. *Pudmanund Singh*[2] the meaning of the term 'judgment' in S. 594, Civil Procedure Code, was considered and the view taken that it must be an order deciding finally any question at issue in the cause or the rights of any of the parties. Cf. also *Wall* v. *Howard*[3].—Ed]

Kishory Mohun Roy v. Mahomed Mujaffar Hossein.—I. L. R. 18 C. 889.—(1) Absence of attachment does not render a sale void, after it has been duly confirmed and a sale certificate granted to the purchaser.—*Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee*[4] followed, and *Mahadeo Dubey* v. *Bhola Nath Dichit*[5] dissented from.

(2) A purchaser *pendente lite* is not bound by proceedings which from the nature of the suit and the relief prayed for, the purchaser could not have expected and that in a claim case a compromise and an order of the Court that the "case be struck off" were such unexpected proceedings.

Semble.—(*a*) The possibility of an appeal is not a sufficient *lis pendens* so as to bind a transferee by the result of the appeal (*b*) a purchaser *pendente lite* is not bound by a consent decree.

1. (1909) I.L.R. 33 C. 1323.
2. (1895) I. L. R. 22 C. 928.
3. (1895) I.L.R. 17 A. 438.
4. (1867) 8 W. R. 9
5. (1882) I. L. R. 5 A. 86.

3. A *bona fide* purchaser of certain property from an ostensible owner is not affected by a purchaser of the same property in execution of a decree against the real owner.

4. The execution-purchasers here, claiming their right through a compromise which the ostensible owner, are estopped from questioning the title of the *bona fide* purchasers referred to above:—*Paresh Nath Mukerji* v. *Anath-Wath Deb*[1] followed. [The case under notice was taken to the Privy Council, and the Privy Council upheld the view of the High Court as regards the question of estoppel and the appeal was dismissed.—ED.]

Ramakrishna Jagannath *v.* Vithal Ramji.—I. L. R. 15 B. 87.—Where a purchaser of mortgaged properties from the mortgagees, at an auction sale sued the mortgagor for possession, and the mortgagor disputed the purchaser's title under his purchase, and an issue was framed whether the purchase was *bona fide* and for valuable consideration, and the purchaser got a decree for possession, but no finding was recorded onthe issue: *Held* that a subsequent suit for setting aside the sale and for redemption on the ground that the auction sale by the mortgagees to the purchasers was a nominal and fraudulent transaction, was barred by the previous suit under S. 13, C. P. C., as the decision therein necessarily involved a finding that the defendant's purchase was *bona fide* and for consideration, though no finding was formally recorded to that effect.

Held further: that if the plaintiff, since the decision in the previous suit, discovered evidence and circumstances showing that the question was wrongly decided, his proper remedy was to move for a new trial.

Rampurtab Samruthroy *v.* Premsukh Chandamal.—I. L. R. 15 B. 93.—Where leave is granted under S 12 of the Letters Patent, to file a suit on the Original Side of the High Court, it must be taken to relate to the suit as put forward in the plaint on which leave is endorsed by the Judge accepting the plaint. The grant of leave is a judicial act, which must be held to relate only to the cause of action disclosed in the plaint as presented at the time of the grant. Such leave being the very

1. (1880) I. L. R. 6 C. 265.

foundation of the jurisdiction is not available to confer jurisdiction in respect of a substantially different cause of * action. In respect of such different cause of action, leave cannot be granted after the institution of the suit, nor can the Court try it except in a suit duly instituted In such cases, therefore, the Court cannot grant an amendment of the plaint in respect of which leave was granted. Where contract is made outside the ordinary original jurisdiction of the High Court, but broken within its jurisdiction, the whole cause of action does not arise within the jurisdiction, and the suit cannot, therefore, be instititured in the High Court without obtaining leave of the Court. *Muhammad Abdul Kadar* v. *The East Indian Ry. Co.*[1] dissented from. [See *Foolibai* v. *Rampratab*[2]; *Dhunjishaw* v. *Fforde*[3]; *Doya Narain* v. *The Secretary of State for India*[4] and *Venkatalutchumi Ammal* v. *Srinivasamurthi*[5].—Ed.] Decisions on S. 17, C.P.C., have no application to suits on the original side of the High Court. [* 251.]

Govind Bin Lakshmanshet Anjorlekar *v.* Dhondbarav Bin Ganbarav Tambye.—I. L. R. 15 B. 104.—The decision in a suit which was of a small cause nature and in which there was no right of second appeal, does not operate as *res judicata* in a subsequent suit (in which the subject-matter is not the same) in reference to issues necessary for the decision of the prior suit. [See the cases noticed in the recent Full Bench case of *Avanasi Gounden* v. *Nachammal*[6] wherein this view is affirmed.—Ed.]

Santaji Khande Rao *v.* Ravji.—I. L. R. 15 B. 105.—No decree can be passed, if a certificate of heirship be not produced, even though the debtor consents to the passing of the decree, as, under S. 4 Act VII of 1889, the passing of the decree is peremptorily prohibited without the production of a certificate. A decree is *against the debtor* when it is passed, though he may consent to the decree. [See upon this point *Nanchand* v. *Enawa*[7].—Ed.]

Sakharam Lakshman *v.* Govind Joti.—I. L. R. 15 B. 107.—*Held* that when a District Judge refers an appeal to the

1. (1878) I. L. R. 1 M. 375.
2. (1893) I. L. R. 17 B. 466.
3. (1887) I. L. R. 11 B. 649.
4. (1886) I. L. R. 14 C. 256 (270).
5. (1900) 11 M. L. J. R. 91 at p. 601; and (1906) I. L. R. 29 M. 239 at p. 261.
6. (1905) I. L. R. 29 M. 195.
7. (1904) I. L. R. 28 B. 630.

Assistant Judge under S. 17 of the Bombay Civil Courts Act, the Assistant Judge acquires full jurisdiction to try the appeal, and the District Judge has no power to revise or set aside an order of the Assistant Judge refusing to set aside an order dismissing the appeal for default—*cf.* S. 13 of the Madras Civil Courts Act III of 1873.

Vithoba *v.* Bapu.—I. L. R. 15 B. 110.—*Held*: An adoption by a widow of an undivided co-parcener with the consent of her father-in-law, who was the head of the family, and natural guardian of the widow, was valid, and the consent of the other co-parceners was unnecessary—per *Candy* J. Provided the consent of the father-in-law of the family was given without any fraud or deception having been practised on him, the motives of the widow (however puerile or malicious they may be) and the effect of the adoption on the interests of the undivided kinsmen, are immaterial. [The question whether in Bombay the motives of the widow of a separated Hindu in making the adoption is relevant is a different one. It is now settled in Bombay that in such a case motives are irrelevant, and the decision of the Privy Council in the *Ramnad case*[1] has no application to cases arising in that Presidency—see *Ramchandra Bhagavan* v. *Mulji Nanabhai*;[2] *Lakshmibai* v. *Sarasvatibai*.[3] But the father in-law's assent cannot survive beyond his life-time—see *Lakshmibai* v. *Vishnu Vasudev*.[4]—Ed.]

Raoji *v.* Bala. I. L. R. 15 B. 135.—Article 131, and not Art. 144, of Sch. II, Limitation Act, applies to a suit by a co-sharer to establish his title to a share in an annual allowance received by another co-sharer from Government, and time runs therefore from the date of demand and refusal. [*Ramnad Zemindar* v. *Dorasami*[5] approved.] If the suit to establish the right is barred, the claim for arrears would also be barred. Otherwise, the claim for arrears in such a case falls under Art. 62 of the Schedule. [A suit by a person for his share of an allowance from the person who had wrongfully received the same would be

1. (1868) 12 M. I. A. 397.
2. (1896) I. L. R. 22 B. 558.
3. (1899) I. L. R. 23 B. 789 at p. 799—per *Candy* J.
4. (1905) I. L. R. 29 B. 410.
5. (1880) I. L. R. 7 M 341. See also per *Subrahmanya Aiyar* J. in *Ramasawmy Aiyar* v. *Kantnayan* (1899) 9 M. L. J. R. 57-59.

governed by Art. 62 of the Limitation Act—see per *Mookerjee* J. in *Mahomed Wahib* v. *Mahomed Amir.*[1] The expression "to establish" does not merely mean "to declare." The Article does not relate to a mere declaratory suit.[2] A suit for a declaration that the plaintiff is entitled to receive Tasdik from Government payable annually is, therefore, governed by Art. 120 and not by Art. 131 of the Limitation Act.[3]—Ed.]

Vithu *v.* Bhima.—I. L. R. 15 B. 145.—When two persons claim to be * brought on the record as legal representatives of [* 252.] a deceased plaintiff, it is not competent to a Court to admit both on the record, or to adjudicate by its decree between their rival claims, and the appellate Court ought not to allow one plaintiff to appeal against the other, or to decide the rights of different plaintiffs *inter se.*

Vishvanath Govind Deshmane *v.* Rambhat.—I.L.R. 15 B. 148.—A suit by trustees, against persons who are alleged to be wrongfully in possession of the trust property, does not fall within S. 539, C. P. C. [See upon this point, the authorities collated by Mr. Justice *Woodroffe* in *Budree Das* v. *Chuni Lal*[4] and Ganapathi Aiyar on 'Hindu and Mahomedan Endowments'[5]—Ed.] The section would not apply even if the case was really a contest as to who were the lawful trustees. Where a Subordinate Judge returned the plaint on the ground that he had no jurisdiction to try the suit, and the order was confirmed on appeal by the District Judge, *held* that the High Court can interfere under S. 622, as the Sub-Judge has failed to exercise a jurisdiction vested in him by law.

SUMMARY OF ENGLISH CASES.* [* 244.]

In Re Weymouth and Channel Islands Steam Packet Co. [1891] I Ch. 66.

Company—Shares issued at a discount—Ultra vires—Rights of original and discount shareholders in distribution—Winding up.

1. (1905.) I. L. R. 32 C. 527 at p. 535.
2. Per *Bhashyam Iyengar* J. in *Ratnam Asari* v. *Akilandammal* (1902) I. L. R. 21 M. 291 at p. 314.
3. *Srinivasa* v. *Subbachariar* (1903) 13 M. L. J. 29.
4. (1906) I. L. R. 33 C. 789 at pp. 804, 805.
5. pp. Cclxxxix.

A Company was incorporated in 1857 with limited liability under the Companies Act of 1856. The capital was divided into fully paid up £ 10 shares. The company resolved to increase their capital in 1861 while in difficulties and their shares were at a discount. By special resolutions the additional and the unissued original shares were issued at a discount of £ 7 per share. The new shares were treated like the old in respect of dividends, &c., for 20 years. On a voluntary winding up the surplus assets had to be divided. On the motion of the liquidator the Court of Appeal held, agreeing with *North* J., that the contract entered into by the holders of the discount shares was a contract as between themselves and the Company alone and *ultra vires*, and as between those shareholders and the old there was no contract express or implied that the new shareholders should be entitled to any priority or advantage in the distribution of surplus assets.

In Re **Patrick Bills *v.* Tatham.** [1891] I Ch. 82.

Voluntary settlement—Incomplete assignment of debts—Debts got in by settlor—Liability of settlor's estate.

Where a person executed a voluntary settlement of certain debts by which he assigned them to trustees on certain trusts but failed to assign the securities for the debts expressly, and afterwards received payment of the debts himself : *held* that the debts were completely assigned by the voluntary settlement and that the trustees could prove as creditors against the estate of the settlor in an action for the administration of his estate.

In re **Sandbach and Edmondson's Contract.** [1891]. I. Ch. 99.

Vendor and purchaser—Misleading conditions of sale—Assumption of facts on which the root of the title depends.

A condition of sale requiring the purchaser to assume certain facts is not misleading if the vendor believes the facts to be true, even though the condition is intended to cover the vendor's inability to prove certain facts which go to the root of the title. In such a case it is not necessary to explain in the condition the specific defect in the title which the condition is intended to cover.

Makins *v.* Percy Ibetson and Sons. [1891] I Ch. 133.

Company—Debenture-holder—Receiver and Manager—Realization of assets.

Under the Articles of Association of a limited Company, the management of the business and the control of the Company were vested in the directors. The memorandum of association authorized the issue of debentures which the Company did, purporting to charge the property present and future, including uncalled capital. The plaintiff who was the sole debenture-holder sued to enforce his securities. On a motion by him, *Kay* J., following *Peek* v. *Trinsmaran Iron Co.*,[1] appointed the Managing Director of the Company, Receiver of its property and Manager of its business, pending realization, with a view to enable the Company's business to be sold as a going concern, the plaintiff undertaking to provide a sum for wages and current expenses and to be* answerable for the [* 245.] receipts of the Receiver and Manager pending his giving security and to procure the realization of the property as soon as possible.

Frames v. Bultefontein Mining Co. [1891] I. Ch. 140.

Remuneration of Directors of a Company—Net profits—Percentage—Sale of the undertaking and assets.

The Articles of Association of a Company provided that the Directors should be paid each year, as remuneration for their services, 3 per cent. on the net profits of such year. On a voluntary winding up, the assets were sold and a large profit realized. On an action by a director for his proportion of the 3 per cent. of the profits : *held* that "net profits" in the article, were profits made by the Company as a going concern and not profits made by a sale of the undertaking and assets, and that the Director's remuneration was a return for services to which the sale was not attributable.

[*Rishton* v. *Grissel*[2] approved.]

In Re **Joshua Stubbs, Ld. Barney v. Joshua Stubbs, Ld.** [1891] I Ch. 187.

Debenture-holder's action—Winding up—Leave to continue action.

Where, while a debenture-holder's action against a Company is pending, an order is made for winding up the Company, the plaintiff is entitled to leave under S. 87 of the Companies Act, 1862, to continue his action, unless the official liquidator is able and willing to give him all he is entitled to in the action, without its continuance.

1. (1876) 2 Ch. D. 115.

2. (1868) L. R. 5 Eq. 326.

Western National Bank of City of New York.

v.

Perez Triana & Co. [1891] I. Q. B. 304.

Service of writ—Action against foreign firm—Service on person temporarily within jurisdiction as partner.

A writ was issued against a partnership (sued by the firm name) which carried on business abroad and had no place of business in England and all the partners in which were domiciled and resident abroad. The writ was served in England upon a person expressly as partner, who was temporarily there and whom the plaintiffs alleged to be a partner in the firm. He entered a conditional appearance which was struck out as irregular on the plaintiffs' motion, and he then entered an unconditional appearance, and in his own name moved to set aside the service on the ground that he was not a partner in the defendants' firm. *Held* by the Divisional Court and by Lord *Esher* M. R. that under Rule 6, Order IX, the service on the alleged partner was good service on the firm. *Held* by *Lindley* and *Bowen*, L. JJ., following *Russell* v. *Cambefort*[1], that Rule 6 of Order IX did not apply to a foreign firm and that the service was not good service on the firm; but that the service on the defendant as an individual was good service if he was named in the writ, and that he waived the irregularity, if any, by appearing. Ordered that if plaintiffs would elect to amend the writ by stating that the appellant was sued with other members of the firm named separately, the service should stand against him; if the plaintiffs did not elect, the writ must be set aside.

Handley *v.* Handley. [1891] P. 124.

Divorce—Access to children—Wife found guilty of adultery.

Where on the ground of the wife's adultery a decree for dissolution of marriage has been passed, and the infant children of the
[* 245.] *marriage had been given into the custody of the husband, the Court will not, unless under exceptional circumstances, allow her access to them.

In Re **Castioni.** [1891] I. Q. B. 149.

Extradition—Offence of a political character.

Held (per *Denman*, *Hawkins* and *Stephen*, JJ.) on a construction of S. 3 of 33 and 34, Vic., Ch. 52, namely "a fugitive

1. (1889) 23. B. D. 526.

criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character," that to bring an offence within the words "of a political character" it must be incidental to and form part of political disturbances. Any act done in the course of a political rising or in the course of an insurrection is not necessarily of a political character. [The definition in Stephen's 'History of the Criminal Law,' Vol. II. p. 71, approved.]

Mayor, &c., of Salford *v.* Lever. [1891] I. Q. B. 168.

Principal and agent—Fraud—Bribe paid to agent by third person contracting to supply goods to principal—Remedies of principal against agent and third person.

Where an agent who has been bribed so to do, induces his principal to enter into a contract with the person who has paid the bribe, the principal may recover from the agent the amount of the bribe which he has received, and he may also recover from the agent and the person who has paid the bribe, jointly and severally, damages for any loss he has sustained by reason of his having entered into the contract, without allowing any deduction in respect of what he has recovered of the bribe from the agent; and it is immaterial whether the principal sues the agent or the third person first.

The plaintiffs, a Corporation, purchased a supply of coal from the defendant who induced the plaintiffs' manager by a bribe of 1*s*. per ton to accept his tender for a price of *s*. 1 per ton in excess of the proper price. The plaintiffs paid the price to the defendant and he paid the bribe to the manager. The plaintiffs on discovering the fraud, sued the manager for recovery of the amount of the bribe, but afterwards entered into an agreement with the manager that he was to assist them in actions against the coal contractors for damages for the loss sustained by the plaintiff in consequence of the frauds; that the manager should guarantee that the damages should amount to a certain sum and deposit the same in a bank; that the sums recovered in the action should go towards part satisfaction of the guarantee, and that the plaintiffs should give complete discharge on recovering the whole of the guaranteed amount. The manager made the deposit as agreed. The plaintiffs brought the suit against the defendant.

Held that the agreement being a mere postponement of the action against the manager, it was no defence, that the rule as to the release of one of two joint tort-feasors operating as a discharge of the other had no application, and that the agreement being not under seal was invalid even though the Corporation would not take the objection. *Held* also, per Lord *Esher* that the agreement was *ultra vires* the Corporation, as they had bound themselves to bring the action, and if the action failed, to pay the costs in the first instance, and take the chance of the manager paying them. Per *Lindley* L. J. that the agreement was not *ultra vires.*

[* 247.] ***The Queen v. Barnardo Jones's Case.**

[1891] I. Q. B. 194.

Habeas Corpus—Custody of infant—Right of mother of illegitimate child.

An appeal lies from an order of the Queen's Bench Division directing the issue of a writ of *Habeas Corpus* to bring before the Court an infant in order to dertermine who is entitled to have the custody of and control over such infant. [*Cox* v. *Hakes* [1] distinguished.] The Court will in a proper case give the same effect to the mother's wishes in respect of the care, education and maintenance of an illegitimate child as it gives to the wishes of the father of a legitimate child in those respects. Parents cannot bind themselves by any agreement to transfer the custody of their children. [*Reg.* v. *Clarke* [2] referred to.]

Mackay v. Macguire. [1891] I. Q. B. 250.

Parliament—Occupation franchise—Effect of bankruptcy on occupation as tenant —Receipt of rent by landlord.

A person claimed the right of voting in respect of the occupation of a house in a borough as a yearly tenant though he had been adjudicated a bankrupt during the qualifying period. After the adjudication the landlord had continued to receive rent from the claimant and had allowed him to remain in possession during the remainder of the qualifying period. The trustee in bankruptcy had interfered. *Held* that there was a continuous occupation by the claimant as tenant within the meaning of S. 3 of 30 and 31, Vic. Ch. 102, and that he was entitled to be registered as a voter.

1. (1890) 15 Ap. Cas. 506. 2. (1857) 7 E. & B. 186.

Bolton v. Buckenham. [1891] I. Q.B. 278.

Principal and surety—Covenant in mortgage—Consolidated mortgage—Giving time.

In 1857 the mortgagor, and the defendant as his surety, covenanted to pay a mortgage debt of £ 450 in 1858. In 1884 this mortgage and others were consolidated and the plainti, advanced to the mortgagor £3,200 to pay them off, under a deed of mortgage taking assignments of those debts and the mortgaged properties "with full benefit of the covenants contained in the respective mortgage deeds". The mortgagor covenanted with the plaintiff for the payment of £3,200 in January 1885, but the defendant was not a party to this deed. *Held* that the covenant in the deed of 1884 necessarily implied that the principal debtor could not be sued for the £450 under the covenant in the deed of 1857 before January 1885, and as there was thus a giving of time to the principal debtor, the defendant was discharged from liability as surety.

Serraino and Sons v. Campbell. [1891] I.Q.B. 283.

Bill of lading—Incorporation of conditions of Charter Party.

Goods were shipped under a Charter party and Bill of Lading. The latter excepted certain risks and added that the assigns were to pay freight for the goods "and all other conditions as per charter, &c." The charter party, in addition to the said risks, provided: "Negligence clause as per Baltic Bill of Lading, 1885." The Baltic Bill of Lading specified collision and stranding by negligence of master. Owing to the negligence of the master the ship was stranded and the goods lost. The plaintiffs, endorsees of the bill of lading, but strangers to the charter party, sued the ship-owners for the loss of the goods. *Held* that the words "all other conditions as per charter" would only incorporate into the bill of lading the conditions which would have to be performed by the receiver of the goods but did not incorporate the exception of stranding occasioned by the master's negligence, and that the ship-owner was liable to the plaintiffs. [*Russell* v. *Niemann*[1], not overruled by *Gray* v. *Carr*[2].]

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1. (1864) 17 C. B. (N. S.).   2. (1871) L.R. 6 Q.B. 522.

[* 217]
JOTTINGS AND CUTTINGS.*

Mr. Munton on the Outlook for Law Students.—He said it was well-known that the number of trials in the High Court from one year's end to the other would not, if it were equally distributed, mean a single cause a-piece for all the Barristers and less than half a cause each for all the solicitors, so that irrespective of the falling off of this class of business the major portion of the work of solicitors must always be that of general advisers and diplomatists in the management of the affairs of their clients. To acquire the ability to perform this satisfactorily, a man had to do much more than become learned in book law—he had to study his fellow man, and to obtain that kind of knowledge which, of all others, was wanted to safely, securely and dexterously attain the rights to which a client might be entitled. He was of opinion that many young men were wrecked in the yearly stage by disregarding the necessities of the position and overlooking the circumstance that tact was sometimes more valuable than all else
[* 218] put *together. He did not undervalue close attention to the study of the law; on the contrary, he was glad to see the present stringency of the test in this respect, and there was no question that under the system now in force—that for honours especially—first-rate lawyers pure and simple were daily admitted to the profession. But even honours—of which he wished to speak gently, as he himself was lucky enough to get a place in his day—counted for very little in the affairs of life—cultivation of business memory, carefulness of detail, caution when on delicate ground, careful listening to others to make sure of grasping the correct point, conciliatory firmess with an adversary, mixing with the world in various other pursuits—thus getting to know something of its ways—in short, the acquiring of a general knowledge of men and manners which went so far to make up the successful lawyer. He had come to the conclusion that the outlook showed that it was absolutely impossible for all the solicitors who were now admitted to find lucrative employment for their time, and that work was gradually becoming of such a character, that people would do well to carefully consider the real aptitude of those they desired to send into the profession instead of merely seeking a place because the avocation was one that stood well in the eyes of the world. If a solicitor in good practice advertised for an admitted

clerk he was inundated with answers, many of the candidates being so closely packed with law that it was difficult to unpack any of it in an emergency; but he believed that there was abundant work ready for many young men unfavourably situated if they would only bear in mind that besides reading law, they should take every opportunity of storing up miscellaneous information, essential attributes to what was popularly known in the profession as a 'good all-round man.'

CRIMINAL RULINGS. * [* 252]

Referred case No. 185 of, 1888, Criminal Procedure Code, Ss. 349, 436.

1. In Calendar Case No. 49 of 1888 on the file of the 2nd Class Magistrate, Udayagiri, the Magistrate convicted the accused of house-breaking, and referred the case, under S. 349, Cr. P. C, to the Acting Head Assistant Magistrate for enhanced punishment, as the accused had been twice previously convicted, and in one case sentenced to 10 years' rigorous imprisonment. The acting Head Assistant Magistrate retransferred the case to the 2nd Class Magistrate with directions to commit the accused to the Court of Sessions. The Sessions Judge submitted that such committal by the 2nd Class Magistrate was contrary to the ruling of the High Court in Cr. Rev. C. 195 of 1886, which lays down that the Magistrate to whom the case is referred should himself commit the accused to the Sessions Court. The High Court replied that the committal by the 2nd Class Magistrate was not illegal and may be acted on by the Sessions Judge. This reply, the Court observed, followed the ruling referred to by the Sessions Judge, and does not conflict with the ruling in *Queen Empress Chandu Gowala*[1] (*12th April* 1888.)

2. Criminal Revision Case Nos. 54 to 56, Criminal Procedure Code, S. 106—Power of Appellate Court. The High Court at the instance of the District Magistrate, set aside the order passed by a Deputy Magistrate in appeal directing defendants to furnish security to keep the peace. The order was *ultra vires* under S. 106, having been passed by an Appellate Court. (*30th January* 1887.)

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1. (1889) I.L.R. 14 C. 355.

RETROSPECT OF THE ENGLISH LAW REPORTS FOR 1890.*

[* 253.]

We shall resume our review of the English Law Reports for 1890. There are some interesting decisions on the law relating to contracts. The case of *Bristol Cardiff and Swansea Aerated Bread Co.* v. *Maggs*[1], decided by *Kay* J. (now Lord Justice *Kay*), reaffirms some well recognised principles relating to proposal and acceptance. The contract related to the sale of a baker's shop. The offer was made by a letter which stated that it was to hold good for ten days. A reply was sent within ten days accepting it. Apparently the contract became complete. But when the Solicitors of the vendor sent a formal memorandum of agreement, they entered in it several terms not expressed in the two letters. The purchaser's solicitor added a new clause restricting the vendor from carrying on a similar business within certain limits. A correspondence then followed between the Solicitors for the two parties, which ended in the Solicitor for the vendor withdrawing the offer. This was done within the days for which the offer was to hold good. An action was brought by the purchaser against the vendor for specific performance of the contract alleged to be constituted by the two original letters. The Court held, following *Hussey* v. *Horne Payne*,[2], that although the two letters standing alone would be evidence of a sufficient contract, yet a negotiation for an important term of purchase and sale carried on afterwards was enough to show that the contract was not complete, and that the vendor was therefore at liberty to put an end to the negotiations, by withdrawing his offer though within the ten days mentioned in his letter.

It ought not to be inferred that this decision is an authority for holding that a concluded contract can be set aside by either party without the consent of the other. But if one of the parties [* 254.] *reopens the matter by introducing a new stipulation, and says that he will accept the contract only if the new stipulation is agreed to, and treats what took place previously as only an incomplete bargain, it will be open to the other side to say that he will not accept the contract on those terms and to put an end to

1. (1890) 44 Ch. D. 616.

2. (1879) 4 A. C. 311 ; *Cf.* also *Lever* v. *Koffler* (1901) 1 Ch. 543.

it, as it would be inequitable to permit one side to say that although he treated the matter as incomplete and a negotiation only, yet the other side had no right to do so but was bound by a completed contract. The law in regard to a completed contract is to be found in the later case of *Bellamy* v. *Delenham*[1] where *North* J. held that though when a contract is contained in letters, the whole correspondence should be looked at, yet if once a definite offer has been made and it has been accepted without qualification and it appears that the letters of offer and acceptance contained all the terms agreed upon between the parties, the complete contract thus arrived at cannot be affected by subsequent negotiation or be got rid of without the consent of both.

It would, of course, be different if the party against whom a specific performance of a contract is claimed can show that the correspondence which is relied upon as constituting a complete contract did not contain all the terms of the actual contract, and that there were other terms then in negotiation which were not concluded. To do this it would be open to him to rely upon other correspondence between the parties, both previous and subsequent, to be relied upon by the other side and also upon parol evidence outside the written documents altogether. If he shows that the correspondence relied upon did not contain the whole of the contract, and, that being so, that which was called a contract, was not complete, he could resist the enforcement of it. This was the point decided by the House of Lords in the earlier case of *Hussey* v. *Horne Payne*.[2] The following propositions may be laid down on the authority of these cases :—

(1) Where a plaintiff relies upon letters as proving a complete contract, it would be open to the defendant to resist specific performance of the same by showing by reference to other evidence, oral and documentary, that the letters relied upon by the plaintiff did not contain all the terms of the actual contract, and that no concluded and completed contract had been established.

(2) *If the letters relied upon show that there was a complete [* 255.] contract, it cannot be set aside by either party without the consent of the other, and in the absence of such mutual consent, the contract will not be affected by subsequent negotiation.

1. (1890) 45 Ch. D. 481 affirmed in [1891] 1 Ch. 412. 2. (1879) 4 A. C. 311.

(3) If a concluded agreement is reopened by one side by further negotiations and the subsequent correspondence shows that the party reopening treated the agreement as still unconcluded, it is open to the other side to put an end to the contract.

* * * *

[We should submit that the last conclusion is couched in rather unscientific language. We cannot understand a *concluded agreement* being still *unconcluded.* All that is meant, we suppose, is that the correspondence as a whole must be looked to. We have to see whether, taking the correspondence as a whole, there is such a proposal and such a final acceptance as import the consent of the parties. The Courts have regard to the substance of the transaction, so that, notwithstanding that there may be an apparent acceptance, yet, if the conduct of the parties shews that they regarded the transaction as still in the stage of negotiation, then the apparent acceptance is not such a final or unconditional acceptance as will conclude a contract. The principle is well enunciated by Mr. Justice *North* in *Bellame* v. *Debenham* [1] : "When once it is shewn that there is a complete contract, it is impossible that further negotiations between the parties can, without the consent of both, get rid of what I may call the crystallized contract already arrived at and as in the present case, contained in the letters. Of course, it may be an open question whether the terms of the contract really were all settled and the fact that further negotiations took place, as well as the language of those negotiations may be very important as throwing light upon the state of things at the time when the alleged contract was signed by the party to be charged".—ED.]

We have discussed in the Critical Notes for February of our Journal (p. 82), the right of a person who being a party to an illegal contract claims restitution of money paid for him in pursuance of such contract. The Court of Appeal held in *Kearly* v. *Thompson* [2] that money paid under an illegal contract, which has been partially carried into effect, cannot be recovered back.

In the case of *Windhill Local Board of Health* v. *Vint* [3] the facts were these. The plaintiffs who were a Local Board brought an indictment against the defendant for interfering with and

1. (1890) 45 Ch. D. 481 at pp. 493, 494. 2. (1890) 24 Q. B. D. 712.
3. (1890) 45 Ch. D. 337.

obstructing a public road. At the trial of the indictment an agreement for compromise was made between the solicitors of both parties and sanctioned by the Judge and was afterwards confirmed by a deed executed by the plaintiffs and defendant. By this deed the defendant convenanted to restore the road which he had broken up, within seven years, and the plaintiffs covenanted that when that had been done they would consent to a verdict of 'not guilty' on the indictment. The defendant failed to restore the road and the plaintiffs then brought an action on their convenant claiming specific performance and damages. The Court of Appeal held, affirming the judgment of *Stirling* J. that as the indictment was for a public injury the agreement to consent to a verdict of 'not guilty' was against public policy and illegal, and the plaintiffs could not maintain an action on the defendant's covenant. As Lord Justice *Cotton* put it :—'The Court will not allow, as legal, any agreement 'which has the effect of withdrawing from the ordinary course of 'justice a prosecution when it is for an act which is an injury 'to the public. It would be the case of persons taking into their 'own hands the determining what ought to be done ; and that 'ought not to be taken into the hands of any individuals even 'if they are a *quasi* public body like the plaintiffs in the suit, but '*ought to be left to the due admininistration of the law and to the [* 256.] 'judges who can determine what, in the particular case, ought to 'be done.' It must however, be remembered that if the matters are of public concern, they are not the subject of compromise, and the consideration that the benefit secured by the compromise is a benefit to the public, or that the stipulation in the compromise is to the same effect as the object of the prosecution does not in the least influence the decision.

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Some interesting questions of law connected with infants becoming apprentices to learn a calling were decided in the case of *De Francesco* v. *Barnum.*[1] In this case by an apprenticeship deed between an infant, her mother and the master, the infant was bound apprentice for a term of seven years to be taught stage-dancing upon certain terms, by one of which the infant

1. (1889) 43 Ch. D. 165 and (1890) 45 Ch. D. 430.

bound herself not to contract without the consent of her master. The deed also contained mutual covenants by the master and the parent, that the master would make certain payments to her for all dancing engagements during the said term. But there was no stipulation that the master should provide engagements for the infant, or maintain her while unemployed. There was a provision that the master might put an end to the apprenticeship if the infant after fair trial should be found unfit for the work, or break any of the engagements of the deed, or in any way misconduct herself. The infant having accepted an engagement to perform for the defendant *Barnum*, before the expiration of the said term, without the master's consent, the master brought an action against *Barnum*, the infant, and her mother to enforce the provisions of the deed and for damages for breach of it, and pending the action, he applied for an interim injunction to restrain the infant from performing, and *Barnum* and the mother from inducing or allowing the infant to perform in violation of the terms of the deed. *Chitty* J. rejected the application for injunction, holding on the authority of an old case (*Gylbert* v. *Fletcher*, *Cro. Car.* (170) that no action would lie on apprenticeship deed against the infant apprentice herself to enforce any of the covenants which she purports to enter into. The covenant therefore in this deed on the part of the infant that she would neither [* 257.] *contract professional engagements nor accept such, unless with the full written permission of her master, could not be enforced by an injunction, as the right to an injunction depended on the legal right to sue. He rested his order also on the ground that in the exercise of the discretion vested in him as to the grant of an injunction, he should not issue one as there was no provision in the deed that plaintiff should provide employment to the infant, and the result of an injunction might be to leave the infant until the trial without any remuneration or employment whatever. The action came on for trial before Lord Justice *Fry* sitting as an additional Judge of the Chancery Division[1]. He expressed his concurrence in the view taken by Mr. Justice *Chitty* in regard to the action against the infant on the covenant, and stated that he

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1. See Lord Esher's explanation of this Judgment in *Ceris* v. *Mathews* (1895) 1 Q. B. 310 at p 314. See also *Cleaments* v. *L. N. W. Ry. Co.* (1894) 2 Q. B. 48.

would be unwilling to extend decisions the effect of which was to compel persons who were not desirous of maintaining continuous personal relations with one another to continue those relations, that it was not in the interest of mankind that the rule of specific performance should be extended to such cases, and that the Courts should be jealous lest contracts of service should be turned into contracts of slavery. He then discussed the question whether there was a valid contract between the infant and the master. After holding that a contract by which an infant bound herself to learn an art or trade to her own future profit was, *prima facie*, valid and binding, but subject to the exceptions that she could not bind herself to be liable to a penalty or forfeiture or by extraordinary or unusual stipulations which are unreasonable and not good in law, he examined the facts of the particular case before him, and came to the conclusion that some of the stipulations were unusual and unreasonable, which threw an inordinate power into the hands of the master without any correlative obligation on his part, and therefore the deed was one which was not for the benefit of the infant. She was not bound by it, and as the defendant *Barnum* only enticed her away from a contract which was not binding upon her, no action could be maintained against him. He dismissed the suit against all the defendants. We have stated the case at so much length, as it involves an important question of law affecting minors, and the Judges have laid down the law applicable to them with great care and precision. In India also such questions are likely to arise frequently, and it would be just as well to know precisely how the law stands.

* In the case of *Valentine* v. *Canali*[1] the robust common sense of the *Lord Chief Justice* and *Lord Justice Bowen* revolted from doing what the former justly called a cruel injustice, though the plaintiff was an infant and the object was to undo a contract entered into by him with the defendant. The plaintiff had agreed with defendant to become tenant of a house and to pay a certain sum for the furniture therein. The plaintiff paid defendant part of this sum and executed a pro-note for the balance. He occupied the house and used the furniture during several months. He brought this suit to have the contract declared void and the amount paid by him returned. The Judge found [* 258.]

1. (1889) 24 Q. B. D. 166.

that the plaintiff was an infant when he entered into the contract, declared the contract to be void and ordered the pro-note to be cancelled but refused to order the return of the sum paid. An appeal was preferred against this portion of the decree by the plaintiff, but the Court of Appeal dismissed it, holding that though the words of S. 1 of the Infants' Relief act (37 & 38 Vict., C. 62) were strong and general, a reasonable construction should be put upon them, and not one which would involve a violation of natural justice, that when an infant had paid for something and had consumed it, it was contrary to natural justice that he should recover the money which he had paid. The section in question runs as follows: "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent or for goods supplied or to be supplied (other than contracts for necessaries) and all accounts stated with infants shall be absolutely void : provided always that the enactment shall not invalidate any contract into which an infant may by any existing or future statute or by the rules of common law or equity enter except such as now are voidable." We wish that Indian Judges showed a little of the same spirit in dealing with Indian enactments which, drafted as they often are by men far inferior to those entrusted with similar work in England, are but crude productions full of blemishes. By literally interpreting these acts, our Judges sometimes do what the Lord Chief Justice calls cruel injustice, but console themselves with the idea that if injustice is done, it is the Legislature that is to blame and not themselves. English Judges have a higher idea of their responsibility in interpreting statutes, which if it does not result in the administration
[* 259] of* law according to Indian notions, certainly results in the administration of justice.

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Where an agent takes a bribe to induce his principal to enter into a contract with the briber, what are the remedies open to the principal as against the agent and as against the briber? These questions are discussed in the two cases, *Mayor, etc., of Borough of Salford* v. *Lever*[1], and *Lister & Co.* v. *Stubbs*, [2] In the first of these cases the facts were these. The plaintiffs were proprietors of gas works and it was the duty

1. (1890) 25 Q. B. D. 363. 2. (1890) 45 Ch. D. 1.

of their manager to examine tenders for the supply of coal and advise the plaintiffs thereon. The defendant, a coal merchant, submitted to the plaintiffs tenders for the supply of coal. Before submitting the tenders, and with a view to procure the manager's recommendation of them, the defendant corruptly agreed to pay to the manager a secret commission or bribe, and in order to recoup himself for the commission so promised, he inserted in the tenders prices which were in excess of the current market prices by the amount of the commission. The manager induced by the promise of the commission advised the plaintiffs to accept the defendant's tenders which they did. The defendant delivered the coal and received the prices named in the tenders and paid to the manager a considerable portion of the commission. The manager received such commission from other contractors also. The plaintiffs, on discovery of the frauds, entered into an agreement with their manager whereby it was agreed that he should assist the plaintiffs by giving the necessary information and evidence to bring actions against such contractors for recovery of damages for the loss sustained by them in consequence of the frauds, that he should guarantee that the damages recovered should amount to a certain specified sum and as security for the guarantee he should deposit securities, that any sums recovered should in such actions be taken in part satisfaction of the guarantee, and on plaintiffs recovering the full guaranteed amount, they should give the manager a complete discharge. The manager deposited the securities. The plaintiffs brought an action against the defendant to recover the difference between the prices paid and the current market prices. It was contended by the defendant that the plaintiffs' cause of action was for a writ in respect of which* the defendant and the manager were joint wrong-doers and [* 260.] that the agreement between the plaintiffs and the manager coupled with the deposit of the securities by the latter amounted to a discharge of the manager by way of accord and satisfaction, and consequently operated to discharge the defendant also. The Court held that the matters relied on afforded no defence to the action. The plaintiffs had two remedies open to them: to sue the manager for the secret profits he had made while acting as agent for plaintiffs and to sue both the manager and briber for the damages they had sustained through the fraudulent conduct of these two

persons. *Charles* and *Denman*, JJ., held that the guarantee given by the manager was in respect of the cause of action against the manager for the profits he had secretly made and the briber could not avail himself of that guarantee either for reducing the amount payable by him for the fraud to which he was a party or as a bar to the action. *Williams*, J., went further and held that the agreement between the plaintiffs and the manager was illegal, *ultra vires*, and of no effect. The agreement was illegal and *ultra vires* because the corporation had no right to present to the manager the amount he had received in bribes on account of the corporation, and the agreement was void as against public morality, because it was an agreement to present an intended witness with moneys proportioned to the effect of his evidence. In the case of *Lister & Co.* v. *Stubbs* [1], the plaintiffs, a manufacturing company, employed the defendant who was their foreman to buy for them certain materials which they used in their business, and the defendant under a corrupt bargain took from one of the firms of whom he so bought large sums by way of commission, a portion whereof he invested. The plaintiffs brought an action against the defendant to recover the moneys so paid to him claiming to be entitled to follow such moneys into the investments thereof, and they moved for an injunction to restrain the defendant from dealing with the investments or for an order directing him to bring the moneys and the investments into Court. *Stirling*, J., after a careful examination of the authorities, came to the conclusion that the relation between the defendant and the plaintiffs was that of debtor and creditor and not that of trustee and *cestui que trust*. The test that he applied to settle the point was the one laid down by *Lord Justice Cotton* in *Metropolitan Bank* v. *Heiron* [2]. Was this *a case of a *cestui que trust* seeking to recover money which was
[* 261.] his before any act wrongfully done by the trustee. Holding that it was not, he rejected the application for an injunction to restrain the defendant from dealing with the property in which the money had been invested. This decision was upheld by the Court of Appeal.

[See also *Powell* v. *Evan Jones and Co.* [3]:—ED.]

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The decision of *Butt*, J. in *The Mark Lane*[4]* will be found interesting as to the meaning of the word duress

1. (1890) 45 Ch. D. I.
2. (1880) 5. Ex. D. 319.
3. (1905) 1 K. B. 11.
4. (1890) 15 P. D. 135.

* See the case discussed in *The Rialto*, 1891 P. 175.

or compulsion in Maritime law. The facts of the case were these:—Plaintiff's steamer fell in with defendant's steamer in the Atlantic, which had lost part of her propeller, was leaking, and could not use her engines. The defendant's vessel which was in distress was towed by the plaintiff's vessel to Halifax, a distance of about 350 miles. Before the service was begun the masters of the salving and salved vessels signed an agreement that the owners of the salved vessel should pay £5,000 for the service or a sum for work done if it was unsuccessful. The master of the salving vessel would not take a less sum and the master of the salved vessel had reasonable grounds for believing and believed that his vessel would be abandoned if he did not sign the agreement. The sum of £5,000 was more than one-fifth of the total value of the salved vessel, her cargo and freight. The plaintiff brought an action on the Admiralty side claiming the sum of £5,000 according to the agreement or in the alternative such a sum as the Court might think proper. The defendant contended that the agreement was not binding on him on the ground that it was unreasonable and exorbitant, and that it was signed under duress. The Court held that though there was not in the case the amount of duress which would invalidate an agreement at common law, still in that Court the same amount of compulsion or duress was not necessary to induce the Court to refuse to enforce an agreement and therefore awarded £3,000 to the plaintiff. This judgment would commend itself to all lay minds as the result of sound common sense. When one holds the rod, as an English judge put it, and the other bows, there is not that equality between the parties which would justify the application of the ordinary principles regulating the enforcement of contracts between parties dealing at arm's length with each other.

THE CONTRACTUAL CAPACITY OF MINORS.*

There is considerable difference of opinion on the question of the capacity of minors to enter into contracts, and the rights and liabilities resulting from agreements to which they are parties[1]. [* 262.]

[1. It is now settled by the decision of the Judicial Committee in *Mohori Bibi* v. *Dhurmodas Ghose* (1903) L.R. 30 I. A. 114, s. c. I. L. R. 30 C. 539 that an agreement by or with an infant is void. It does not serve any good purpose now to note the conflict of decisions prior to the decision of the Judicial Committee.—ED.]

The law on the subject in this country, as it now stands, must depend on the interpretation to be placed on the sections of the Contract Act (IX of 1872) that have reference to the subject, but before considering these sections, it may be of use to state very briefly the state of the law at the time that the enactment was passed.

In England, the general rule was that contracts by infants (*i.e.*, minors) were voidable by them, but not absolutely void, or in clearer language, an infant could always enforce against others promises by them in his favor, but promises by an infant could not be enforced against him during his infancy, or after he ceased to be an infant in case he avoided it within a reasonable time after attaining age (provided he did not ratify it subsequent to the attainment of age). In the language of *Hayes* J. in 14 Ir. C. L. R., p. 356, an infant was not absolutely incapable of binding himself, but was generally speaking, incapable of absolutely binding himself, by contract. To this general rule, however, there were some exceptions.

(*a*) In certain cases, if the contract was for the benefit of the minor, it was absolutely binding on him, as if he were a major. This was the case chiefly in contracts entered into by minors for necessaries[1].

(*b*) Contrariwise, we often find it stated that if a contract was manifestly injurious to an infant it was absolutely void as against him and not merely voidable, and could not be binding even after ratification, as in the case of a purchase of goods for trade, a bond with a penalty attached to it, a lease without reservation of rent, contracts on negotiable instruments, and on accounts stated. But Sir Frederick Pollock points out (Pollock on Contracts, pp. 52 to 58) that the decisions do not really go to this extent, but only establish the proposition that the contract could not be enforced against the infant, and that he could avoid it.

(*c*) In the case of obligations attached to an interest in property, an infant could not avoid them without giving up the

[1. The true ground of a minor's liability for necessaries is not on contract but on an obligation created by law. It is an obligation attached or implied in law or a *quasi* contract. The liability is attached without any question as to the consent of the minor. The Indian Contract Act very properly treats such liability as an obligation resembling that created by contract :—ED.]

interest, as in the case of a lease, sale, or mortgage. With regard [263.] to contracts of partnership, he was bound to express his desire to avoid, very soon after attaining age, and was otherwise held liable for all debts and obligations of the partnership contracted after his majority.

(*d*) There was one exception to the rule, that a major contracting with an infant was as much bound by the agreement as if it was with a major, *viz.*, in cases of specific performance. This was on the ground that specific performance could not be granted at the instance of a person who could not himself be compelled to perform it specifically—*Flight* v. *Bolland.*[1] The same reasoning would disentitle the minor to enforce a promise, the consideration for which was something to be done or suffered by him in future, as he could not be compelled to perform his own part of the agreement at the instance of the other party. In all other cases, there never was " a question as to the infant's right to compel a major contracting with him to carry out the contract, and the terms 'void' and 'voidable' had reference only to the liability of the infant." (See Leake on Contracts). By *void* was meant that from the beginning it had no effect as against him, and could not therefore acquire any, even by ratification after attaining age. By *voidable* was meant that it was valid unless repudiated by the infant on attaining age, and, therefore, could be ratified. It did not require ratification, for it was valid and binding, unless and until it was avoided, but by ratifying it after attaining majority, the infant deprived himself of the right to avoid or rescind it. Consequently, it follows that a ratification made by a minor before attaining age is of no use—*Newry* and *Enniskillen Ry. Co.* v. *Combe* [2]; but an avoidance during non-age would probably be effective, in case there is no ratification subsequent to the attainment of age, but where it is ratified, the minor would probably not be allowed to avail himself of the dissent expressed during minority.

In America the law was to the same effect, and still appears to be so (see Parsons on Contracts, Vol. I, pp. 333-8).

In India also, the rules of English law were enforced. Contracts by a minor for necessaries were held to be absolutely

1. (1828) 4 Russ. 298. 2. (1849) 3 Ex. Ch. 565.

binding on him—*Bykuntnath Roy Chowdhry* v. *Pogose.*[1] In other cases they were held to be binding on him unless avoided by him
[* 264.] on his attaining majority*—*Hari* v. *Jita Ram*[2] and *L. Rennie* v. *Gunga Narain Chowdhry*[3]—and he was bound to exercise his right of avoiding within a reasonable time after attaining age—*Boiddonath Dey* v. *Ram Kishore Dey*[4] and *Durga Churn Saha* v. *Ram Narain Doss*[5]. It was always assumed that a minor himself could enforce contracts in his favor against the promisor. See *Behari Lall* v. *Beni Lall* [6] where *Stuart*, C. J., examines the English and Indian authorities.

In this state of the law, Act IX of 1872 was passed, the provisions of which have now to be examined. A few definitions must be referred to, before considering the sections immediately bearing on the question.

In S. 2, an agreement, a void agreement and a voidable contract are thus defined : "Every promise and every set of promises forming the consideration for each other is an agreement." "An agreement not enforceable by law is said to be void." "An agreement which is enforceable at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract." The definition of a voidable contract is not altogether happy. It might perhaps be more correctly defined as a contract, which one or more of the parties thereto may avoid or repudiate, while another or others cannot do so, but which is binding also on the party entitled to avoid, unless and until he exercises his right to avoid.

The sections treating of the capacity of a minor to contract are 10 and 11. The first paragraph of S. 10 is as follows : "All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration, and for a lawful object and are not hereby expressly declared to be void." Although in form the section says only that *certain agreements are* contracts, and does not lay down that *all* contracts must possess the requisites mentioned therein, or in other words that *other* agreements *are not* contracts, the object evidently was to give a

1. (1866) 5 W. R. C. R. 2.
2. (1869) 3 . B. L. R. A. C. 26.
3. (1865) 3 W. R. C. R. 10.
4. (1870) 13 W. R. C. R. 166.
5. (1870) 13 W. R. C. R. 172.
6. (1881) I. L. R. 3 A. 408 at pp. 411,412.

full and exhaustive definition of a valid contract binding on the parties to it. There is no other section which does so, and to construe S. 10 as merely enumerating the characterestics of *some agreements* which are contracts would be to make it to some extent *purposeless, as it can be of no real importance to mention the attributes of *some contracts*. Taking the section then to be a full definition of a *contract*, and omitting the last clause of it, which refers to express statutory prohibitions of certain kinds of agreements, we find that in every agreement which is a *contract*, four conditions have to be satisfied : (1) the parties should be competent to contract ; (2) they must consent ; (3) the consent must be free ; (4) both the object and the consideration should be lawful. Now what is the result, when any one of these conditions is not fulfilled? Will the agreement then be void altogether, *i.e.*, not enforceable by either of the parties thereto, or will it be a voidable contract, *i.e.*, one which one or more of the parties thereto may avoid, but is binding on all until it is avoided? As the section is a definition of the term *contract*, the natural inference would be, that the failure of any of the conditions would make the agreement *not a contract*, *i.e.*, not enforceable at all, and the agreement could be void. But on examination we find that this was not quite the intention of the legislature. In two out of the four cases, the result is no doubt to make the agreement *void*, *viz.*, where the object or the consideration is not lawful, see Ss. 23 and 24, and where there is no consent, that is, where the parties to the agreement do not agree upon the same thing in the same sense, as required by S. 13. But when the consent is not free, but is caused by coercion, undue influence, fraud, or misrepresentation, the agreement is not void, but a contract voidable at the instance of the person or persons whose consent is so caused. Where the consent is caused by a mutual mistake, the agreement is void (Ss. 19 and 20). Now what is the result when one of two parties is not competent to contract? We shall consider only the case of incompetency arising from minority. Is it not enforceable at all by either party, or is it one which the *minor* may avoid, but is binding on both him and the other party unless he avoids it, or is it absolutely void against the minor but valid as against the other party? The construction that it is a voidable contract, *i.e.*, voidable at the instance of the minor, is opposed to the plain language of the section, which [*265]

declares that an agreement made by a party not competent to contract is not a *contract* at all, *i.e.*, not enforceable, while agreements which are only voidable at the instance of some of the parties thereto, are always called *contracts* in the Act, see S. 2
[*266.] Cl. (*i*), Ss. 19, 20,* 21, 22, 24 to 30, 64 and 65; and it would not be necessary to mention this construction, were it not for the fact that in the case of the failure of one of the conditions, *viz.*, freedom of consent, the consequence is really to make the agreement a voidable contract as laid down in S. 19. It is clear, however, from other sections of the Act and other provisions of the Statute book elsewhere, that the agreement is not a voidable contract. If the intention were to treat it as such, the legislature would, in all probability, have enacted that the minor cannot exercise this right of repudiation in the case of agreements entered into by him for necessaries, especially as this would be in accordance with the law then in force; on the other hand, the Act treats such agreements as altogether void against the minor, and in order to protect minors in necessitous circumstances, creates a special liability by S. 68 for necessaries purchased by a minor. That section treats such a case as "a relation *resembling* a contract" and provides that a person supplying necessaries to an infant, is entitled to be reimbursed from the minor's property. Moreover, the legislature has considered it necessary to enact a special section in reference to contracts of partnership to declare them not absolutely void, but only voidable as against minors. It lays down that "a person who has been admitted to the benefits of partnership under the age of majority becomes, on attaining age, liable for all the obligations incurred by the partnership since he was so admitted, unless he gives public notice within a reasonable time of his repudiation of the partnership." This section would be unnecessary if agreements made by a minor were binding on him as a rule, unless avoided. The object of the legislature is further rendered quite clear by S. 7 of the Transfer of Property Act IV of 1882 and S. 7 of the Trusts Act II of 1882. The former provides that a person not competent to contract (and therefore a minor) cannot make a transfer of property. If an *agreement* to transfer property were only voidable, there could be no reason for making an actual transfer by him quite inoperative. The latter lays down that a minor cannot create a trust

except with the permission of a principal Court of Original Civil Jurisdiction. This construction may, therefore, be dismissed without further consideration.

There remain two more interpretations of the section to be considered : 1st, that the agreement is altogether void, that is, not *enforceable, either by the minor or the other party to the contract. [* 267.] In the case of two of the four conditions of a valid contract referred to, *viz.*, absence of consent, and unlawfulness of the object or the consideration, as well as where the contract is entered into in consequence of a mutual mistake, this is no doubt the case, and the language of the section would seem to favour the adoption of a similar view in this case also, as an agreement by a minor is declared by the section not to be enforceable. But there are serious difficulties in the way of such a construction. In the first place, it could hardly have been the intention of the legisature to deprive minors of the benefit of contracts entered into with them when it is to their advantage.[1] The object of the legislature was to save infants from being compelled to perform promises which they may improvidently enter into to their own disadvantage, and from the effect of ratification of such promises, which they are often induced to make from various motives. Secondly, the history of the law on the subject is against the adoption of such a view. Prior to the enactment of Act IX of 1872 the right of a minor to enforce promises made in his favor by a major contracting party was undoubted both in England and in India, and there never was a doubt entertained as to the wisdom or justice of allowing him to do so. It is improbable, therefore, that the legislature intended to make any change in the law in this respect. Thirdly, such a change would place those for whose benefit it was intended at great disadvantage frequently, and sometimes leave them without any remedy. Suppose, for instance, a minor enters into an agreement with *A* to do personal work for *A* and actually does the work ; if the agreement be void as against both *A* and the minor, the latter cannot recover his wages against *A*; or suppose *A*, a minor, enters into

[1. This is a pure guess. It does not appear clear why such an intention should not be imputed to the Legislature. There is nothing absurd in depriving minors of the capacity to contract and making promises void though for their benefit when entered into by them directly and not through the medium of the guardian:—Ed.]

an agreement with *B* for the purchase of B's house and pays *B* the price of it, he cannot recover the house for which he has paid, because the agreement for its sale is void. Can he recover the money ? It was paid voluntarily and not paid under a mistake of fact and could not be recovered on that ground. In cases of void agreements, the Act provides for restitution only where the agreement is *discovered* to be void, (see S. 65), *i.e.*, where parties enter into an agreement under some mistake of fact, as in the case of an agreement to sell a horse which was dead before the date of the contract, in the belief that the horse was living. There is no
[*268.] such *right apparently, when parties enter into an agreement, which they know or ought to know to be void.[1] Nor does it seem that the minor would be entitled to recover the consideration under S. 94 of the Trusts Act which provides that " * * where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the person having such interest, or the residue thereof, to the extent necessary to satisfy their just demands," as this section seems to refer to property in *specie*. To take another illustration, suppose there is a registered agreement in favor of a minor, made out of love and affection by a near relation, but without other consideration. According to the view under consideration, the minor could not enforce such an agreement, though, if he were a major, he could under S. 25 of the Act. Unless, therefore, we are compelled to adopt such a construction, we ought not to do so. Let us examine closely the wording of the section and see whether a more reasonable construction is not possible. It enacts that "*an agreement made* by persons competent to contract, &c., is a contract." Now an agreement is a promise or a set of promises forming the consideration for each other. Substituting for the word "agreement" its equivalent "promise"[2] we have "a promise made by a person competent to contract, &c., is a contract ;" competency to con-

1. [The Privy Council has held that Ss. 64 and 65 of the Contract Act can have application only when there was an agreement between competent parties and not where there never was and never could have been any contract.—*Mohori Bibee* v. *Dhurmodas Ghose* (1903) L. R.30 I.A-114 —ED.]

2. [But promise according to the Act is an accepted proposal. One must know in what sense the word *promise* is used in the subsequent expression "promise made by person, &c."—ED.]

tract is therefore required only in the person *making* the promise and not in the person in *whose favor* the promise is made, *i.e.*, the parties to the agreement need not both be competent to contract but only the party *making* a promise.[1] The result is that where the minor is the promisor, the agreement is void, but where he is only the promisee, it is valid. So when a minor *A* enters into a contract with *B* to purchase *B*'s house for Rs. 100 paid by him to *B*, *B* may be compelled to perform his part of the contract and convey it to *A*. In many cases, no doubt, both the parties concerned are promisors. Thus in the familiar instance of *B* promising to sell a horse to *A* in consideration of the latter paying *B* 100 Rs., the one promises to sell, the other promises to pay Rs. 100. In common parlance, the agreement may be said to be a contract for the sale of the horse, and the undertaking on *A*'s part to pay the 100 Rs. the consideration for it. But in law, both alike are promises, forming the consideration for each other. In such a case, if *A* (for instance) happen to be a minor, he cannot enforce the agreement against *B*, because* the consideration for *B*'s promise, namely the payment of 100 Rs. to him by *A* being legally unenforceable his (*A*'s) promise is invalid for want of consideration. Wherever, therefore, the consideration for a promise in favor of a minor, is a promise by him, he cannot enforce the former as against the promisor, as it is invalid for want of consideration. The conclusion we come to is :— [* 269.]

(1) A promise *by* a minor is not only voidable but absolutely void[2].

(2) A promise made *to* a minor is also void if the consideration be a promise by the minor.

(3) In other cases a promise to a minor is not void on the ground of the minority of the promisee[3].

1. [With great deference one is not able to follow the line of reasoning adopted here :—ED.]

2. [This is settled to be the law according to the highest judicial tribunal in India :—See *Mohori Bibee* v. *Dharmadas Ghose* (1903) L. R. 30 I. A. 114 s.c. I. L. R. 30 C. 539.—ED.]

3. [This distinction cannot seem to hold good after the decision of the Judicial Committee in the case already cited. At p. 124 of the Report they observed : "Looking at these sections (Ss. 2, 10 & 11) their Lordships are satisfied that the Act makes it essential that *all* contracting parties should be 'competent to contract' and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act."—ED.]

This conclusion derives some support from the course of legislation in England subsequent to the passing of the Contract Act. "The Infants Relief Act, 37 & 38 Vict. Ch. 62," passed in 1874, changed the law with reference to some contracts and declared them absolutely void as against minors, so that a subsequent ratification after the attainment of age is of no effect. S 1 enacts "all contracts * * * entered into *by* infants *for the repayment* of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries) and all accounts stated with infants shall be absolutely void." It will be noticed that the section makes void only contracts *by* infants for payments to be made by them. S. 2 declares that ratification of such contracts shall also be invalid. The Act leaves minors as before, quite competent to enforce promises in their favor.

There have been very few decisions in this country on the competency of minors to contract, since the passing of the Contract Act. In *Behari Lall* v. *Beni Lall*[1], *Stuart*, C. J., discussed the question of the capacity of a minor to be a mortgagee, but the decision did not turn on the point. He held that he *could be* a mortgagee. But he proceeded entirely on the English Law and did not consider the provisions of the Contract Act. He assumed that a promise made *by* a minor is not absolutely void but only voidable, and observed that the repudiation of the contract by the minor must be made within three years after the minor attains age. The only other reported case seems to be *Sashi Bhushan*
[*270] *Dutt* v. *Jadu Nath Dutt*[2].* In that case the plaintiff, a minor, sued to recover the amount due to him on a bond given for the value of certain goods. The defendant contended that the bond was not enforceable as the plaintiff, one of the parties to it, was a minor on the date of its execution. *Garth*, C. J., and *McDonnell*, J., held the contract was enforceable. They said: "It is true that the language of the Indian Contract Act may well have led to the mistake, but we consider that the bond here is the same as it is in England. A contract entered into with a minor is only voidable at the option of the minor. [See Addison on Contracts[3]

1. (1881) I. L. R. 3 A 408. 2. (1885) I. L. R. 11 C. 552.

3. [It is useless to note the various conflict of decisions in the several Courts upon the question raised in this article as it is concluded by the decision of the Judicial Committee in the case already referred to: *Mohori Bibee* v. *Dharmodas Ghose* 3 (1903) L. R 30 I. A. 114. Now an agreement by or with an infant is altogether void :—ED.]

See also *Hari Ram* v. *Jita Ram.*[1] Unfortunately the case was not argued before their Lordships and the judgment is too brief to be considered of much authority. It was assumed that the Act did not make any change in the law as it stood before 1872. The actual decision, however, is in accordance with the view taken in this paper.

It is to be regretted that in the Indian Contract Act four conditions, the failure of which leads to three different results, should have been combined in one section and all laid down as requisites for an agreement being a contract. In the case of two of them, the non-fulfilment renders the agreement void as against all. In the case of a third, the result is to make it void in some instances (as in cases of mistake) and at other times voidable at the instance of the person or persons whose consent to the agreement was improperly obtained. In the case of incompetency to contract, a promise *by* the incompetent party is absolutely void as against him, but a promise made to him is not invalid.

ABETMENT BY THE SUBJECT OF RAPE.* [*271.]

The question which is stated in the heading of this article is one which could hardly have arisen under the old law regarding rape. But the age of consent having been recently altered with reference to the offence, it is just possible that the question may arise in future and a discussion of it will, therefore, not be without interest. As the law now stands, a person who has sexual intercourse with a girl below 12 is guilty of rape even though she gives consent. But can the girl herself be punished for abetment of it? Mere consent on the part of a girl to sexual intercourse may or may not amount to abetment. But it is needless for the present purpose to consider whether in the case of an act involving the presence of two persons, it is possible for a person to consent to the act without intentionally aiding the act and thereby abetting it. Cases can be easily conceived in which a girl not merely consents to the act, but solicits and incites a person to commit it. In such cases the conduct of the girl would apparently fall within the definition of abetment in S. 107 of the Penal Code. But whether it really constitutes abetment and whether she can be punished for it can only be determined after deciding

1. (1869) 3 B. L. R. A. C. 426.

the wider and more important question whether a person between the ages of 7 and 18 can be guilty of abetment of any offence committed against himself, or herself, except attempt to cause death. It will be convenient to ascertain first the law as regards adults over 18, and then see how far it is applicable to the case of persons who are not adults, but who are above the age of irresponsibility for crime.

[* 272.] *Ordinarily men are at liberty to do what they like with their own persons, or property, provided they do no harm to others. I say ordinarily, because it is competent for the Legislature to restrict this liberty, and it has restricted it in one instance, *viz.*, the right to put an end to one's own life. The proposition is too plain to require any authority. The law usually interferes with the subject not by positively declaring what things he may do, but by laying down what he shall not do. Except so far as the legislature has curtailed the natural liberty of the subject, he would be free and entitled to do what he liked. This principle is embodied in S. 79 of the Penal Code. The only restriction placed by the law of India on a person's actions towards himself is, that he shall not attempt to commit suicide. If a person emasculated himself, or put out his eyes, or cut off a limb, burnt down his house [1], or shot his horse, he would be guilty of no offence. The reasons for the concession of his general liberty and for a limitation upon it, where the act is one that tends to the destruction of life, are well set forth by Macaulay's Committee in Note B of their report submitted with the Draft Penal Code. The reason is stated to be "that it is impossible to restrain men of mature age and sound understanding from destroying their own property, their own health, their own comfort, without restraining them from an infinite number of salutary or innocent actions. It is by no means true that men always judge rightly of their own interest. But it is true that, in the vast majority of cases, they judge better of their own interest than any law-giver, or any tribunal, which must necessarily proceed on general principles, and which cannot have within its contemplation the circumstances of particular cases and the tempers of particular individuals, can judge for them. It is difficult to conceive any law which is effectual to prevent men from wasting their substance on the most chimerical speculations, and

1. We suppose this is too wide.

yet which dos not prevent the construction of such works as the Duke of Bridgewater's Canals. It is difficult to conceive any law which prevents a man from capriciously destroying his property, and yet which does not prevent a philosopher, in the course of chemical experiments, from dissolving a diamond, or an artist from taking ancient pictures to pieces, as Sir Joshua Reynolds did, in order to learn the secret of the colouring. It is difficult to conceive any law which prevents a man from capriciously injuring his own *health, and yet which does not prevent an artisan from employing himself in callings which are useful and indeed necessary to society, but which tend to impair the constitutions of those who follow them, or a public-spirited physician from inoculating himself with the virus of a dangerous disease. It is chiefly, we conceive, for this reason, that almost all Governments have thought it sufficient to restrain men from harming others, and have left them at liberty to harm themselves." The law would seem to be the same in England, but there is no express statement to be found, probably because the principle is so obvious. [*273]

The next step in the argument is, that whatever a person may lawfully do to himself, he may cause the same to be done to himself by others. Here again the liberty must be understood to be subject to any restraints which may be imposed by the Legislature. The liberty allowed by the Penal Code to a person to do harm to another with the latter's consent is not co-extensive with the right of a person to injure himself, but slightly narrower. Not merely death, but even grievous hurt is not justified by the consent of the person whose death or grievous hurt is caused; see S. 87 of the Penal Code. Whatever grounds of expediency there may be for allowing a person to inflict grievous hurt on himself, the Legislature considers that to allow one man to inflict grievous hurt on another, even with his consent, for purposes not beneficial, would have the effect of lowering the sanctity of human life. In England it seems to be doubtful whether a man may not consent to the infliction of pain on himself, if the pain is not for a purpose injurious to the public, *vide* Stephen's Digest of the Criminal Law, Art. 207. Except in the cases of death and grievous hurt, it is clear that harm done to another is justified by consent, and *a fortiori* by incitement. If a person above 18 incited another to inflict harm on him, he would not

be guilty of any abetment, because there is no substantive offence committed. But if the person giving the consent is below 18, a substantive offence is certainly committed; but is there any abetment? The reason for fixing 18 as the age above which a man may give valid consent to the infliction of harm on himself is the very same reason that led the Legislature to fix that age as the age of majority for the purposes of the civil law. It is the age at which men may be ordinarily supposed to arrive at sufficient maturity of understanding to form a sound judgment of the consequences of [*274] *their actions upon themselves. As regards the consequences of men's actions towards others, the law, no doubt, assumes a much earlier age of discretion, partly because such consequences are more obvious and partly because such an assumption is required on grounds of policy. On the other hand, considerations of prudence are comparatively slow to develop in youth, and in view of this mental immaturity, the Legislature undertakes to protect them in spite of themselves against the dangers of an unsound judgment. In S. 96 of Macaulay's Draft Penal Code corresponding to S. 87 of the present Code, the age was fixed at 12. But the subsequent Committees were probably of opinion that the age was so low, that a capacity to judge of the consequences of actions on oneself could not be ordinarily formed, and they therefore raised the age limit to 18. It would, therefore, be a strange anomaly if the Legislature, having enacted for the protection of youth that its consent shall not justify harm, were to punish it for abetment, the result of the very immaturity of judgment, in consideration of which the substantive offence was enacted. It dees not stand to reason to hold, that the law expresses its solicitude to shield young men from the dangers of unripe judgment by punishing them for abetment of offences against themselves.

The proper conclusion seems then to be, that it does not follow, that because a substantive offence is committed, a person between 7 and 18 who incites it is necessarily guilty of abetment. Whether he is guilty or not would depend on the question whether the offence was one directed against himself, or others, or the public generally. If it was only against himself, there would be no legal abetment. But otherwise, if it is against others, or against the public. An examination of the provisions of Ss. 107 and 108 of the Penal Code fortifies one in this conclu-

sion. The ground on which abetment is punished is, not that the moral depravation of the principal or his obnoxiousness to the criminal law is compassed by the abettor, but that a third person is injured and that the abettor has a share in causing that injury. Explanation III of S. 108 provides that it is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge. The only moral ground on which an infant can be asked to be made liable for abetment of an act *which, if done [*275] by himself, would be no offence is, that he has led another into the clutches of the criminal law, and is thus guilty of a wrong. But if I have correctly apprehended the principle of liability for abetment, this reason for punishing an infant cannot be maintained.

Ample warrant can be found in the Code for the classification of offences into those which are so by reason of harm to a particular individual, and those which are so by reason of harm to more individuals than one, or to society. In one sense no doubt, all offences are offences against the public, but still some offences are offences because of the injury to an individual and some of these are therefore compoundable. Others again are offences because of the injury to the interests of society, or to third parties in addition to the person primarily affected. As Sir James Stephen observes: "Crimes are, as a general rule, immoral actions, but it is only in a few cases that they are punished because they are immoral. In the great majority of cases an immoral act is punished as a crime only when it involves an outrage on some particular person"—General View of the Criminal Law, 2nd Edition, p. 104. S. 87 of the Penal Code provides that "nothing which is not intended to cause death or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt is *an offence by reason of any harm which it may cause, or be intended by the doer to cause*, to any person above the age of 18, who has given consent, whether express or implied, to suffer that harm; or *by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.*"

The words italicized occur also in Ss. 88 and 89. S. 91 provides that "the exceptions in Ss. 87, 88 and 89 do not extend to

acts which are *offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause to the person giving the consent*, or on whose behalf the consent is given." Rape is an offence because of the injury to the girl or the woman[1]. But other offences are so independently of the harm caused to the person who is the subject. And the illustration given in S. 91 itself is that causing miscarriage, except in good faith to save the life of the woman, is an offence independently of any harm to the woman, and that the consent of the woman will not therefore

[*276] *justify the act. Wherever, therefore, the offence is an offence purely by reason of the harm to an individual, he cannot be punished for abetment. But in all other cases he may be made so liable. Thus kidnapping from lawful guardianship is an offence because of the violation of the rights of the guardian. An infant who abets such kidnapping can therefore be punished as an abettor. Adultery is an offence against the husband and a wife abetting it would be liable to punishment, but for the special clause that the wife shall not be punishable as an abettor. As regards unnatural offences, both the parties are under the English law regarded as principals and the offence is regarded, not as one committed by one party against the other, but as an offence against society committed by both, and it is not therefore analogous to the class of cases we have been considering; see Russell Vol. I, p. 88c, 5th Edition.

The objection may be brought forward against the views herein set forth that the Penal Code being a complete Code, it would not be allowable to put this narrow interpretation on the words of S. 107. But the section ought to be construed in reference to the other sections and to the general scheme and policy of the Code so as to avoid absurdity and harshness. The tenor of the S. 107 itself appears to support the view I have taken. The principle of putting a restrictive interpretation on apparently general words of a statute to obviate inconvenience, or absurdity, or extension to cases not within the policy of the statute, has been applied in numerous English cases. In the recent case of *Reg.* v. *Tolson*[2] where the English statutory provision relating to

[1. But is it not also an offence because of the injury to the interests of society? At any rate the offence constituted by the amendment is so because of such injury.—ED.]

2. (1889) 23 Q. B. D. 168.

bigamy had to be interpreted, the Court of Queen's Bench held it necessary to restrict the section to cases in which there was no *bona fide* belief of the other party's death. In a still more recent case *Railton* v. *Wood*[1] it was laid down by the House of Lords, that a statute must be so construed as, if possible, to avoid the extension of it to collateral effects and consequences beyond the scope of the general object and policy of the statute itself and the apparently general words of a statute were cut down for the purpose of obviating inconvenience. In *Lester* v. *Torrens*[2] the words to be construed were words occurring in the Licensing Act of 1872 "that every person found drunk on licensed premises should be liable to a penalty." The words though literally wide enough to cover the case of the publican, *who had got drunk [*277]
anywhere, and was found in that condition in his bed after the house was closed, were in accordance with the manifest object of the Act confined to persons found on the premises, while using it as a house for public resort.

Coming back to the question with which we started, it would be absurd to hold that a girl below 12, who is incapable by law of giving a valid consent to sexual intercourse so as to cure it of its criminal character, should yet be deemed to possess sufficient understanding to make her liable for abetment of an offence, the gist of which is the want of a mature consent. The entire absence of authority on the point under discussion is, I am inclined to think, in my favour. If no prosecutions for abetment of this kind have ever been made, it must be, not because there have been no cases of such abetment, or that feelings of commiseration prevented prosecution, but because it was supposed to be legally impossible for a person to abet an offence against himself. I should have thought that the question was free from doubt, and capable of only one answer, but for the fact that some of my esteemed friends in the law hold a contrary view, which they will probably enforce in a subsequent issue of the Journal.

P. S. SIVASWAMY AIYER.

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1. (1890) 15 A. C. 363.
2. (1877) 2 Q. B. D. 404.

[*277] MITAKSHARA*.

82. Women should be honoured with ornaments, clothing, and food, by their husbands, brothers, fathers, gnatis,fathers-in-law, mothers-in-law, husbands' brothers and by bandhus.

Further, virtuous women of the aforesaid description should be honoured by the husband and others with ornaments, cloths, food, flowers, &c., according to their means. Because, treated with respect, they (women) promote Dharma, wealth and enjoyment.

And the author now describes how a woman entrusted with household affairs should conduct herself.

83. She should keep well all articles required for the
[*278] **household, should be clever, cheerful, and a verse* to extravagance. She should be devoted to her husband and should salute the feet of her parents-in-law.**

संयतः placed each in its proper place; उपस्करः All things required for the household ; she (who keeps the household things in the proper place) is said to be (संयतोपस्करा.) For instance, the mortar, the pestle and the winnow in the place for pounding, the grinding stones in the grinding place, and so on. Clever *i.e.*, dexterous in the discharge of household duties. Cheerful, *i.e.*, always wearing a smiling countenance. Averse to extravagance, *i.e.*, not having an extravagant disposition.

The words '*should be*' must be understood with every word. Again, parents-in-law, *i.e.*, the father-in-law and the mother-in-law. By the rule of Panini[1] by which one of the two compounded words alone survives relating to Ekasesha compound, *i.e.*, with the word *Svasru* the word *Svasurah.* She should salute their feet always. The mention of *Svasura* is for the purpose of including others fit for being honored. Devoted to her husband, *i.e.*, remaining under the control of the husband, she should do what has been said before.

The author has laid down what a woman should do while her husband is present. He now proceeds to lay down what she should do when the husband is absent from the place.

84. She whose husband is absent shall give up play, embellishment of her person, the sight of crowds and festivals, amusements and going to others' houses.

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1. I., 2—71.

She, whose husband is absent in another place, should give up play as with balls, &c., the embellishment of her person by the use of fragrant unguents, &c., sight of crowds, *i.e.*, any collection of people and festivals such as marriages and other amusements, *i.e.*, pastimes or amorous sports, and visiting other people's houses. The words 'should give up' are connected with each of the objects.

85. The father should protect the maiden; the husband, the married woman; and the sons should protect her during old age; in default of them, the kinsmen (gnatis). Independence is never allowed for women.

Moreover, before marriage, the father should protect the girl from doing what is improper; after that, the husband. In default of the husband, and when she is old, the sons In default (of all the aforesaid), the kinsmen, and in default of kinsmen, the king,*by reason of the saying "that on extinction of (relations on) both sides, the king is the protector and lord of women." [*279]
Hence no independence to women at any time.

86 A woman who is without her husband should not remain except with her father, mother, son, brother, father-in-law, mother-in-law, or maternal uncle. Otherwise she will be deserving of censure.

Further; a woman without her husband, *i. e.*, deprived of her husband, should indeed not be without the father, &c., because remaining without them, she is liable to censure. And this is in case of her leading a life of austerity, as it is mentioned in the Vishnu smriti that, "when the husband is dead, either a life of austerity or ascending the funeral pyre of the husband." [1] By ascending the funeral pyre of the husband great prosperity is attained. So Vyasa has illustrated this in the form of the story of the female pigeon: "Devoted to her mate she entered the glowing fire and there reached her mate who was wearing variegated armlets. Then the bird accompanied by his wife went to heaven and honoured for his good deeds he there passed his time in enjoyment with his wife." So also *Sankha* and *Angirasa* having declared (as laid down) "she who ascends the pyre of her husband will dwell in paradise for as many years as there are hairs on the human body, of which there are three crores-and-a-half" point out the inseparability of the husband and wife.

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1 Vishnu XXV § 14.

As the serpent-catcher pulls the serpent by force out of the hole (where it dwells), so the woman who follows her husband in death raises him (the husband) up and is happy with him[1]. Devoted to her husband and extolled by numbers of celestial damsels, she passes her time there (in heaven) with her husband in sport for as long as the reign of 14 Indras." Similarly, "whether the husband is the murderer of a Brahmin or of a friend or is an ungrateful man, a woman who, not suffering widowhood, dies with him, purifies him." So also *Harita* [2] (says): "The woman who, when her husband is dead, ascends the pyre is honoured in heaven as one equal in virtuous
[*280] conduct to **Arundhati*. As long as a woman does not burn herself to death when her husband dies, so long is she not released from the female body, (*i. e.*, from re-birth as a female)." So *Harita* has declared that "she who follows her husband (in death) purifies three families, the maternal, the paternal and the one in which she is given in marriage." So again, "she is to be known as devoted to her husband who is distressed when he is in affliction, who is pleased when he is happy, who is squalid and thin when he is absent, and dies when he dies[3]." This is a duty common to all women down to the *Chandala* caste who are not pregnant and who have not young children as the words "she who follows her husband"[4] are without any qualification. Those texts which prohibit Brahmin women from following their husbands (in death) such as "*Anugamana* or the following of a deceased husband (to the pyre) is forbidden to Brahmin women by the injunction of Brahma. In the other castes, it is declared to be the highest penance. She (the Brahmin woman) should, being alive, do what is to the benefit of her husband. By dying she is guilty of suicide. That woman of the Brahmin caste who follows her deceased husband by self-immolation will not carry herself or her husband to Heaven" and others refer to those who ascend a separate pyre. This is by reason of the special rule "that it does not behove a Brahmin woman to ascend a separate pyra." Hence permission to ascend a separate

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1. Daksha IV § 20.
2. Daksha § 19.
3. Harita *Adhyaya* VIII p. 396, Cal. Edn.
See Vishnu XXV § 14 cited above.

pyre is implied for Kshatriya and other women. It is said (argued) by some[1], that "As suicide is forbidden to men and women alike, this advice about following the husband in death applies, just like the *Syena* sacrifice, only to her who, owing to her excessive desire for Heaven, transgresses the prohibitory precept[2]; for, the text 'a person who wishes to enchant (for a malevolent purpose) shall perform the *Syena* sacrifice[3]', is held to be an advice (inculcating *Syena*) only to him who has his mind engrossed by intense hate and thus transgresses the prohibitory injunction.[4]" This (however) is improper.

*According to the view of those people who describe the *Syena* sacrifice as producing evil through its result as, in the accomplishment of the object which has *Syena* for its instrument (means) and harm as the thing to be accomplished, the harm is not enjoined as a Vidhi[5] (*literally*, is not touched by the rule) and is within the scope of the prohibition (namely, no harm should be caused to living creatures) it is clear that there is a difference (*i.e.*, there is no analogy) between the *Syena* sacrifice and *Anugamana* (post-cremation) just like (the difference or want of analogy between the former and) the *Agnishomiya* sacrifice by reason of harm being enjoined for the attainment of *Swarga* in the rule relating to *Anugamana* and untouched by (*i.e.*, beyond the scope of) the prohibitory precept (*viz.*, no harm should be caused to living creatures).[6] [* 281]

According to some (others) *Himsa* or hurt is only an act conducive to death; the *Syena* is also *Himsa* or hurt, being an act conducive to the death of the enemy; there is no scope for a *Vidhi*; as in the sphere of actions relating to human desires

1. When the expression "यत्तु" is used it is intended to indicate the opponent's argument with which, however, the author does not concur.

2. *That is* the text that suicide is prohibited.

3. This sacrifice is so called because just as a hawk or falcon will pounce on its prey and devour it, the sacrifice results in the destruction of the sacrificer's enemy.

4. *That is* the text, "he shall not hurt any living creature."

5. It is only Syena sacrifice that is enjoined and not the resultant harm.

6. The argument is this: There is a difference between Syena Vidhi and Anugamana Vidhi as there is a difference between the former and Agnishomiya Vidhi. In the Syena "harm" is not enjoined as a Vidhi. Only the sacrifice (named Syena) is enjoined. In the Agnishomiya, harm (*i e.*, sacrificing a cow) is enjoined and thus it is a special text forming an exception to the general rule that no harm shall be caused. So in Anugamana, (burning oneself with husband,) harm is enjoined and thus this forms an exception to the general rule.

the instruments or means for accomplishing the object being adopted spontaneously from desire; and hence, the *Syena* being of the nature of *Himsa* caused by desire is forbidden as intrinsically wicked. Even in this view there is no scope for an interdiction (in the case of *Anugamana*,) because although death may have been prescribed by the Anugamana Sastra as the means of attaining Heaven, and even though a person may be moved towards it by desire, the adoption of a particular mode conducive to death such as entering the fire[1], can be secured only by means of a *Vidhi* as in the case of the rule which lays down "one desirous of prosperity should sacrifice a white sheep to *Vayu*[2]." Hence the want of analogy between *Syena* and *Anugamana* is clear. According to others, *Anugamana* is improper, being opposed to the text of the *Sruti* that "one desirous of Heaven should not put an end to his life before the natural term." This is not so. The text "one desirous of Heaven should not put an end to his life before the natural term (*i.e.*, night)" means that a person who seeks *absolution* should not put an end to his life before his natural term with the objection of attaining *Swarga* (Heaven). Because, only if there is life left, absolution which consists in the realization of Brahma (which is) eternal and supreme bliss, is possible to one having his mind purified from all blemish by the practice of all *nitya* (obligatory) and *naimittika* (casual and consequential) observances by means of self-knowledge (which is) the result of the investigation of the vedanta, reflection, and profound and repeated meditation. Therefore the meaning (of the *sruti* text) is that life should not be wasted (*i.e.*, destroyed) for securing Heaven (Swarga) which is but transient and affords only trifling temporary happiness. Hence also just like any other *kamya* observance, *Anugamana* is proper for a woman who, not desiring final emancipation, is desirous of Heaven which is but transient and affords temporary happiness. Thus the whole is free from objection.

87. She who is employed in (seeking) what is pleasant and good to her husband, who is well-behaved, and who has conquered her senses attains fame in this world and after death the incomparable course (*i.e.*, heavenly bliss).

Again, what is pleasant, *i.e.*, what is agreeable to the mind at present; what is good, *i.e.*, that which insures felicity in the

1. Either the same or a different pyre.
2. Taittariya Samhita, Khanda 2, Prasna 1, Anuvaka 1.

future. She who is employed,* *i.e.*, devoted to that which is pleasant and good to the husband "स्वाचारा" (who is well behaved) *i.e.*, one whose conduct is proper and becoming. What is proper conduct is pointed out by *Sankha.* [1] "A woman should not leave her home without intimation; should not go out without her upper garment, or in haste; should not talk to other men, except tradesmen, ascetics, old men and physicians; should not display her navel; should wear her cloth down to the ankle; should not expose her breasts; should not laugh exposed to view; should not hate her husband or his relations; should not stop in the same place with courtesans, knavish women, loose women,[2] female ascetics, female fortune tellers, women who conjure by means of magic and women of evil disposition, etc., as conduct becomes improper by (evil) association". "Who has conquered her senses," *i.e.*, one by whom the senses, *i.e.*, the ear, etc., voice, etc., and the mind have been subdued.[3] [* 282]

In this world she attains fame, *i. e.*, reputation, and in the other world a supreme condition (of bliss). All these rules of conduct for women are to be understood (as enforceable or applicable) only after marriage. As it is said in the Smriti[4], before *Upanayana*, people have perfect liberty to go where they like, speak what they like and eat what they like. And marriage has been declared to be the *Upanayana* ceremony for women.[5]

The author now speaks about one having several wives.

88. When there is a wife of the same caste, a man should not cause another wife to do any acts of religious duty and when there are several wives of the same caste, no other wife than the eldest should be employed in acts of religious duty.

When there is a wife of the same caste[6], a man should not cause the religious duties to be performed by another of a different

1. Sankha

2. Literally a woman who keeps an assignation.

3. These are of two kinds. The organs of knowledge (or perception) and the organs of action. The organs of knowledge are five such as eye, ear, nose, tongue and skin. The organs of action are also five such as larynx, hand, foot, anus and parts of generation. The mind is considered as the eleventh organ.

4. Gautama, *Adhyaya* II, first line.

5. Manu, *Adhyaya* II, § 60.

6. If there is not a wife of the same caste, wives of other castes, excepting the Sudra caste, might be joined in the performance of religious duties—*Apararka.* The Sudra wife is excluded by the text of Vasishta. It is not intended by this that the middle and the youngest wife should be totally excluded. They should also be joined along with the edest—*Apararka* citing, texts of Baudhayana and Katyayana.

caste. And when there are several wives of the same caste, any other than the eldest wife, *i.e.*, the middle or the youngest wife, should not be employed in acts of religious duty, *i.e.*, in religious observances.

Having stated the rule for a widow, the author now states the rule for a widower.

[* 283] *** 89. Having cremated a well-behaved wife by means of the Agnihotra (sacred fire) the husband should, conformably to established ordinances, take without delay a wife and the consecrated fire.**

Having cremated a deceased wife whose behaviour was as above described, *i.e.*, whose conduct was proper, by means of the *Agnihôtra*, *i.e.*, the sacred fire and in its default by means of the *Smârtha* fire (*i.e.*, domestic fire[1]) the husband who has not begotten sons or has not performed sacrifices, or is ineligible for other orders of life should, when there are no other wives, again take a wife and the fire according to established ordinances. 'Without delay, *i.e.*, quickly', because *Daksha*[2] has said: "A twice-born should not remain even for a day without being in some one order of life." This rule applies only to a wife who has been joined in the performance of the *Âdhâna*[3] ceremony and not to any other. The text "He who, while the first wife is living, cremates a second wife with the three sacred fires[4] does an act which is as heinous as the drinking of liquor" as likewise the text: "He who gives up his *Agnihôtra* on the death of his second wife or from mere will and pleasure should be regarded as one guilty of the murder of a Brahmin," should be understood to refer to the cremation of one who has not been joined in the *Âdhâna* cere ony.

THUS ENDS THE CHAPTER ON MARRIAGE.

CHAPTER ON THE DISTINCTION OF CASTES[5] AND MIXED CASTES.[6]

After stating that four wives are allowed for a Brahmin, three for a Kshatriya, two for a Vaisya and one for a Sudra, it was

1. *That is* Aupâsana fire.
2. *Daksha* 1, 10.
3. The ceremony preparatory to the *Agnihotra.*
4. *i. e.*, Gârhapatya, Âhavaniya and Dakshina, called also collectively as the Agnihôtra.
5. The four principal castes described by Manu.
6. *That is* Anulômajas, Pratilômajas.

said that sons should be begotten on these. The author now explains the distinction as to caste of the issue begotten, by persons of different castes on women of the various castes.

90. To men of the same caste, from wives (women) of the same caste, in the unreproachable kinds of marriage, are born sons who are of the same caste and who continue the line.

To men of the same caste, *i.e.*, to Brahmins &c.; from women (wives) of the same caste, *i.e.*, from Brahmin women, &c.; sons are born of the same caste, *i.e.*, of the same caste as the father and mother. The word "married" should be taken (read) with "women of the same caste," by reason of its having to be recapitulated as the text. "This is the rule among married women[1]" as to be added to all (that is said before). As the word *married* is a relative[2] term, the word* *married* is to be taken with the expression *men of the same caste*. [* 284] The word *savarna* (of the same caste) has a clear meaning. Hence the meaning is, that those begotten by a husband of the same caste on a wife of the same caste duly wedded according to the ordinances already mentioned, are members of the same caste. Hence it has to be inferred that the characteristic quality of being *asavarnas* (*i. e.*, of not being members of the same caste) is stated as regards *Kundas* (sons born of married women to persons other than their husbands during the husbands' life-time), *Gôlakas* (sons born of adulterous widows), *Kânînas* (sons of maidens), *Sahôdhajas* (sons of women pregnant at the time of marriage) and others. These differ from *Savarnas*, *Anulomajas* and *Pratilômajas*[3] and are subject to the common duties of forbearance from cruelty, &c., from its being so mentioned in the Smriti that "all *Apadhvamsajas* are similar to Sudras." *Apadhvamsajas*, *i. e.*, those born of adulterous connection. They are also subject to the duties of Sudras such as attending upon the twice-born classes and the like. It is objected to this view, that if the *Kunda* and the *Gôlaka* be non-Brahmins, the prohibition of them in *Sraddha* would be irrelevant, and also contrary to reason inasmuch as one begotten by one of a particular class on a woman of the same class belongs

1. Yâjnavalkya Acharadhyaya § 92. 2. Having reference to another.
3. See post, § 91 to 95.

to the same class only just as the offspring of a bull and a cow belongs to the bovine species, the offspring of a stallion and mare is a horse, and there is, therefore, nothing inconsistent in a person begotten by a Brahmin on a Brahmin woman being considered a Brahmin. It is likewise contrary to the text[1] which after enumerating the *Kânîna* and the *Paunarbhava*, and others (declares) "This rule has been stated by me with reference to sons of the same caste."

This (objection) is without force. The prohibition in *Sraddha* is to remove any misconception that one begotten by a Brahmin on a Brahmini is (necessarily) a Brahmin, just as the prohibition in *Sraddha* of such an extremely unlikely person as a degraded man.

Nor is there any conflict with reason. Where caste becomes known by (outward) perception, it will be so, (*i. e.*, the prohibition will be contrary to reason); the castes of Brahmins and others have,
[* 285] however, the Smritis for its authority. * *i.e.*, exist as laid down in the Smritis. As, even though Brahminhood may be common, the *Gotras of Kundina*, *Vasishta*, *Atri* and *Gautama* are based upon the authority of the Smritis, so, even though humanity may be common, the castes of Brahmins, and others have the Smritis for their authority.

This is the characteristic of the caste even of the father and the mother[2]. There is no objection of non-finality[3] because society has no beginning as the association of words with their senses (has no beginning).

But the text[1], "this rule has been stated by me with reference to sons of the same caste," being an explanatory repetition of what had already been said will be appropriately explained.

The *Kshetraja* son, however, is considered equal in caste to his mother by reason of the Smriti allowing *Niyoga* and by reason of the practice of virtuous persons, as *Dhritarashtra*, *Pandu* and *Vidura* who being *Kshetrajas* were (considered as equal in caste) to their mothers. It is needless to dwell further (on this topic). Further, in the unblameable, *i.e.*, *Brahma*, and other marriages, &c., sons are born who continue the line, *i.e.*,

1. Yagnavalkya Vyavahara *Adhyaya* II § 133.
2. *i.e.*, it is determined by the Sastra.
3. *i.e.*, endless series of statements.

who are free from disease, are long-lived and are rich in Dharma and off spring.

Having mentioned about the castes, the author now speaks of Anulomajas.

91. One born to a Brahmin of a Kshatriya woman is a Murdhavasikta; of a Vaisya woman is an Ambashta, and of a Sudra woman is a Nishada or Parasava.

The son begotten by a Brahmin of a Kshatriya married woman is called a *Murdhâvasikta*; of a Vaisya married woman is called *Ambashta*; and of a Sudra married woman is called a *Nishâda*. The word *Pârasava* is given as an alternative name for the *Nishâda* in order that he may not be confounded with a *Pratilomaja* (son) called *Nishâda* whose occupation is fishing. The words "*by a Brahmin*" are to be understood in all places. The text of *Sankha* that "one begotten by a Brahmin of a Kshatriya woman is only a Kshatriya, one begotten by a Kshatriya of a Vaisya woman is only a Vaisya, and one by a Vaisya of a Sudra woman is only a Sudra", is not intended for the purpose of rejecting the *Murdhâvasikta* and other castes but is intended for the purpose of making the duties (Dharma) of the Kshatriya and other castes applicable to them respectively, or it is intended* for the purpose [* 286]
of making the Kshatriya and other castes applicable to them respectively. Hence the *Upanayana*, &c., of the *Murdhâvasikta*, and others must be performed with the stick, skin, the hair [1] and the sacred thread, &c., prescribed respectively for Kshatriyas, &c. Before *Upanayana*, liberty to go where they like, and speak and eat what they like, should be understood as before (in the case of the Kshatriyas, &c.).

92. Sons born of Vaisya and Sudra women to a Kshatriya are called (respectively) Mahishya and Ugra; and a son born of a Sudra woman to a Vaisya is called a Karana. This rule has been stated with regard to married women.

The sons begotten by a Kshatriya on a Vaisya and Sudra wife are respectively called *Mâhishya* and *Ugra*. The son begotten by a Vaisya on a Sudra wife is called *Karana*. This rule giving the names of *Savarna*, *Murdhavasikta*, &c., has been stated, *i.e.*, should be understood, with, reference to married or wedded women. It should be understood that these, *viz.*, the

1. Spotted deer or goat according as the boy is a Murdhavasikta or Ambashtta.

Murdhavasikta, the *Ambashta*, the *Nishâda*, the *Mâhishya*, the *Ugra* and the *Karana* are the six *Anulomaja* sons.

The author now mentions the Pratilômajas.

93. The son born of a Brahmin woman to a Kshatriya is a Suta, to a Vaisya is a Vaidehaka, and to a Sudra is a Chandala[1] who is excluded from all acts of religious duty.

The sons begotten on a Brahmin woman by a Kshatriya, a Vaisya and Sudra become, respectively, *Suta*, *Vaidehaka*, and *Chândala*. Of these, the *Chândala* is excluded from all acts of religious duty.

94. The Kshatriya woman bore the Vaisya the son called Magadha and the Sudra the son called Kshatta, and the Vaisya woman bore the Sudra the son called Ayogava.

Further, the Kshatriya woman begotten by the Vaisya the son called *Magadha*, and she herself by the Sudra the son called *Kshatta*. The Vaisya woman bears to the Sudra the son called *Ayôgava*. These, *viz*., the *Suta*, the *Vaidehaka*, the *Chândâla*, the *Mâgadha*, the *Kshatta* and the *Ayôgava* are the six *Pratilomaja* sons. The occupations of these should be seen in the Smritis of *Usanas* and Manu.[2]

The author now speaks of another caste resulting from the cross union of mixed castes.

[* 287] ***95. A Rathakara is born of a Karani woman to a Mahishya. The Patilomajas and the Anulomajas are to be respectively deemed disreputable and respectable.**

A *Mâhishya* is one born of a Vaisya woman to a Kshatriya. A *Karani* is a woman begotten on a Sudra woman by a Vaisya. One begotten on a *Karani* by a *Mâhishya* becomes a *Rathakâra* by caste. To him *Upanayana* and other ceremonies should be performed as the same are prescribed in the Sastras. As *Sankha* says : " A *Rathakara* is one born of an intermixture between the *Anuloma* offspring of Kshatriyas and Vaisyas. For him are prescribed the duties of sacrifice, gift, and the *Upanayana* sacrament and his pursuits are by acquisition, equestrian accomplishments, carrige-building and house-building. Similarly where there is an *Anulôma* intermixture of the *Mâhishya* woman with a *Murdhâvasikta* who is the issue of a Brahmin and

1. Another reading Chandala.
2. Manu X, 46 to 50.

Kshatriya and so on, a different caste, and the applicability of *Upanayana* and other rites have to be understood by reason of their (the father and the mother) being of the twice-born class. As for their names they should be seen in other Smritis where they are stated. This has been stated merely as an example. We have dwelt upon this subject only to this extent as the castes resulting from the cross union of mixed castes are endless, and impossible to describe. The *Pratilômajas* should be understood as being disreputable and the *Anulômajas* as respectable.

By the Sloka[1] *beginning with "To men of the same caste from wives of the same caste are born, &c." the cause of a person's belonging to any particular caste has been given. The author now gives another cause.*

96. Exaltations of castes are to be understood (as arising) at the seventh or even fifth generation [2]. (Similarly) when there is a reversal of occupation, levelling down. The lower and the higher as before[3].

Castes, i. e., the *Murdhavasikta* and others. Their *exaltation i.e.*, their attainment of Brahminhood &c., is *exaltation of caste* युगे—means *generation* or in the birth. *In the seventh or even fifth.* By the use of the* word *even* (अपि) "so in the sixth also" should be understood. This option is declared by law. This declaration is as follows. A woman begotten by a Brahmin on a Sudra wife is a *Nishâdi.* She having married a Brahmin begets a daughter. She in her turn having married a Brahmin produces another daughter, and so on. Thus the sixth female gives birth to a Brahmin who is the seventh in descent. A woman begotten by a Brahmin on a Vaisya woman is an *Ambashta.* She being the fifth in descent in the same manner produces a Brahmin the sixth in descent. So also a *Murdhavasikta* in the same manner being the fourth in descent produces only a Brahmin who is the fifth in descent. So an *Ugra* and a *Mahishya* woman having married to a Kshatriya produce a Kshatriya who is the sixth and [* 288]

1. Yajnavalkya, §, 90.

2. The Sanskrit word is युगे. This is explained in the Mitakshara as जन्मनि. But Apararka explains it differently by "couples" युगं जायापत्योर्युग्मम्.

3. Apararka explains that the lower and higher is with reference to reversal of occupations and that this is to be applied as in the case of वर्णसंकर (mixture of castes)

fifth in descent respectively. So, a *Karani* having married a Vaisya produces a Vaisya who is in the fifth generation. Similarly inference should be made in other cases also. Moreover, when there is a reversal of occupation, *i.e.*, when there is a reversal of occupation intended to secure livelihood. It is called a reversal of occupation where an option is allowed to a Brahmin when he is not able to maintain himself by his primary occupation to maintain himself by the occupation of a Kshatriya or when he is unable to maintain himself even by this, by the occupation of Vaisya, and failing that, to maintain himself even by the occupation of a Sudra; or similarly when a Kshatriya unable to maintain himself by his own proper vocation may maintain himself by the occupation of a Vaisya or that of a Sudra, and a Vaisya unable to live by his proper calling may live by the calling of a Sudra. When there is such a reversal of callings, if even after the adversity ceases, a man does not give up that occupation in the 5th, 6th or 7th generation there is a levelling, *i.e.*, he becomes one of the same inferior caste by whose occupation he maintains himself. It is as follows:—A Brahmin living by the occupation of a Sudra and not abandoning it begets a son; he also living by the same occupation and so on in succession produces a Sudra only in the 7th generation. Living by the occupation of a Vaisya produces the 6th in descent a Vaisya. Living by the occupation of a Kshatriya produces a Kshatriya in the 5th. A Kshatriya also living by the pursuit of a Sudra producec a Sudra in the 6th generation. He (by) the pursuit of a Vasiya
[*289] *produces a Vaisya in the 5th. So also a Vaisya living by the pursuit of a Sudra and not abandoning it from generation to generation produces a Sudra in the 5th generation.

The lower and the higher as before: The meaning of this is as follows:—In the place where mixture of primary castes (is dealt with) *Anulômajas* and *Pratilômajas* have been described. Those born from the cross union of mixed castes have also been pointed out by the example of the *Kathakâra* class. Now, those born from an intermixture of the primary castes with the mixed castes are pointed out. That which is lower and higher is **अधरोत्तरं**. This is as follows:—Sons begotten on a *Mûrdhâvasikta* woman by a Kshatriya, a Vaisya and a Sudra, as also those begotten on an *Ambashta* woman by a Vaisya and a Sudra as well as sons begotten on a *Nishâdi* woman by a Sudra are inferior *i.e.*, *Pratilômajas*;

similarly sons begotten by a Brahmin on *Mûrdhâvasikta*, *Ambashta* and *Nishâdi* women, by Brahmins and Kshatriyas on the *Mâhishya* and *Ugra*, by Brahmins, Kshatriyas and Vaisyas on a *Karani* woman are higher, *i.e.*, *Anulômajas.* Similarly, inferences should be drawn in other places as well. These lower and higher should be regarded as before, *i. e.*, as disreputable and respectable, respectively.

CRITICAL NOTES.

Hakim-un-Nissa v. **Deonarain.**—I.L.R. 13 A. 102. In this case, ownership in immoveable property, not in the possession of the owner, was treated as an actionable claim[1]. The material facts of the case may be stated in a few words. *A*, a mortgagee by conditional sale of certain properties, obtained in 1874 an order for foreclosure under Reg. XVII of 1806, but being unable to find funds to institute a suit for the possession of the properties, assigned for a small sum in 1884 all his rights as conditional vendee to *B*. *B* sued the mortgagors and *A* for possession of the property. The latter admitted the plaintiff's right to recover. The mortgagors contested her right on the ground that the assignment was a champertous and unconscionable transaction. The High Court (*Straight* and *Brodhurst*, JJ.) reversing the decision of the District Court, held that the assignor having admitted the fairness of the assignment, the mortgagors could not be permitted to impeach its validity, but the right, of which the plaintiff had got an assignment, was an actionable claim, and therefore under S. 135 of the Transfer of Property Act, she could not recover more than the amount paid by her and interest, and the incidental expenses of the sale[2]. The arguments in the case are

[1. The question is hardly worth considering and the amendment of the T. P. Act by Act VI of 1900 has now made it clear that there is no 'actionable claim' in such a case. S. 3 of the T.P. Act, as now amended, defines actionable claim as consisting of 2 classes of cases: (1) claim to any debt other than one secured by mortgage of moveable or immoveable property, and (2) claim to any beneficial interest in moveable property not in the possession of the claimant. So that claim to any beneficial interest in immoveable property not in claimant's possession is not an actionable claim. As to the cases, subsequent to the case under notice and prior to the amendment as to what is an actionable claim, see *Rani* v. *Ajudhia Prasad* (1894) I. L. R. 16 A. 315, *Shib Lal* v. *Azmat-ullah* (1896) I.L.R. 18 A. 265: *Muchiram Barik* v. *Ishan Chander*(1894) I. L. R. 21 C. 568 ; *Russick Lall* v. *Ramnaick*, (1894) I. L. R. 21 C. 792.—ED.]

2. The amendment has now repealed this provision so that assignees of all *actionable claims* will be entitled to recover the full amount or value of the claims although they paid only less :—ED.]

[*290] not *reported, and it is not possible to know from the judgment whether it is contended for the defendants that plaintiff's purchase was of an actionable claim. *Straight* J., after disposing of the objection that the transaction was champertous, observed as follows:—"Now the learned Judge in his judgment apparently was not aware of the provisions which are continued in S. 135 of the Transfer of Property Act." He then proceeded to consider whether the defendant, not having offered prior to suit or paid into Court for the plaintiff the amount paid by her to her assignor, he was not entitled to be discharged by payment of the consideration for the sale, and came to the conclusion that he *was* so entitled[1] dissenting from the decisions of the Calcutta High Court in *Girish Chandra* v. *Kashisauri Debi*[2] and *Khoshdeb Biswas* v. *Satar Mondal*[3]. Whether, if the plaintiff's right was an actionable claim, the decision of the learned Judge on the construction of S. 135 was right, we do not now propose to consider. But we think that it is far from clear that the right in contest was really an actionable claim. The point was assumed by their Lordships, the whole of the judgment relating to it being contained in the sentence already quoted. But as the question is of considerable practical importance we propose to make a few observations on it. The definition of 'actionable claim' in the Transfer of Property Act is couched in rather wide terms, and is not free from the charge of vagueness.[4] "A claim which the Civil Courts recognize as affording grounds for relief is actionable, whether a suit for its enforcement is, or is not, likely to become necessary." The vagueness arises from the use of the word *claim*. Does it mean merely *right*, or is it used in a more restricted sense to denote rights of a certain class? If we take in the former sense, the definition would comprise all rights of a civil nature, all rights over

[1. The view was also affirmed in later cases: See *Phul Chund* v. *Chota Lal* (1898) I.L.R. 20 A. 327. This was also the view of the Madras Court: See *Nilakanta* v. *Krishnasami* (1890) I.L.R. 13 M. 225. Cf. *Arunachellam* v. *Subramanian* (1906) I.L.R. 30 M. 235. In Calcutta, a different view was taken: See also *Muchiram Barik* v. *Ishan Chunder* (1894) I.L.R. 21 C. 568; *Russick Lal* v. *Ramanath Sen* (1894) I.L.R 21 C. 792; *Debendra Nath* v. *Pulin Behary* (1897) I.L.R. 24 C. 763. Cf. also *Debendra Nath* v. *Pulin Behary* (1896) I.L.R. 23 C. 713. As to Bombay: See *Vishnu Mahadev* v. *Dagadu* (1894) I.L.R. 19 B. 290.—Ed.]

2. (1886) I.L.R. 13 C. 145 3. (1888) I.L.R. 15 C. 436.

[4. The definition as now given in S. 3 clearly excludes debts secured on mortgages hypothecations and pledges and also claims to immoveable property and is not so wide in language.—Ed.]

which Civil Courts have jurisdiction under S. 11 of the Civil Procedure Code. It appears to us to be tolerably clear that the legislature could not have intended to use it in such a wide sense. The chapter treating of it, namely Chapter VIII of the Act, is headed "Transfer of Actionable Claims." The seven previous chapters in the Act also treat of different kinds of *transfer*. It is clear that they cannot refer to transfer of actionable claims, as this forms the subject of a special chapter. Actionable claims and the kinds of property dealt with in Chapters I to VII of the Act, must, therefore, be mutually exclusive. Now Chapters I to VII treat of transfers of moveable and immoveable property, and taken with the Contract Act, may be said to be exhaustive of the different kinds of transfers of which they can be the subject. With regard to moveable property, Chapter VII of the Contract Act treats of sales; Chapter IX of pledges (or hypothecation) and bailments; while Chapter VI of the Transfer of Property Act treats of exchanges; and Chapter VII of gifts. Similarly with respect to immoveable property, Chapter III of the Transfer of Property Act treats of sale; Chapter IV of mortgages; Chapter V of leases; Chapter VI of exchanges; Chapter VII of gifts. Chapter II of the Act lays down certain general rules applicable to transfer, some of them relating to both moveable and immoveable property, and others only to the latter, and Chapter I consists merely of a few preliminary sections defining the object and scope of the Act laying down definitions of certain terms. It is clear from *S. 77 of the Contract Act and Ss. 54, 58, 59, 105, 118 and 123 of [*291] the Transfer of Property Act, that the transfer of moveable or immoveable property, not in the possession of the transferer, is dealt with by the Contract Act and Chapters I to VII of the Transfer of Property Act equally with such property in the owner's possession, and that *moveable* and *immoveable* property are not within the meaning of the expression *actionable claim*, although they may not be in the possession of the owner, and a suit may be necessary to enforce the right to them. The word *claim*, says the Calcutta High Court in *Modun Mohun Dut* v. *Futtarunnissa*,[1] should be distinguished from 'ownership.' *Claim* would seem to be used in the sense of a right to some relief against *some particular person or persons*, or a right *in personam* as opposed to

1. (1886) I. L. R. 13 C. 297.

a right *in rem*, *e. g.*, a debt, right to damages for breach of contract, or a tort, &c. It corresponds roughly to what in England is called 'a *chose* (or thing) *in action*', which in all probability suggested to the Legislature the expression 'actionable claim.' Williams defines '*chose in action*' as 'a right of action, or liberty of proceeding in the Courts of law, either to recover pecuniary damages for the infliction of a wrong, or the non-performance of a contract, or else to procure the payment of money due.' (Williams, on *Personal Property*, p. 4). And it is opposed to *chose in possession* which signifies moveable goods, whether they are actually in the possession of the owner or not. The Act does not exactly define the classes of cases coming with the definition; besides debts and rights to damages for breach of contract or torts, it will probably include shares in a Company and other things of the like kind[1]. The title of the chapter at first was 'Transfers of Debts' but was subsequently changed on the recommendation of the Commission appointed to report on the Act. This shows that it was not intended to deal in the chapter with what is ordinarily understood to be moveable or immoveable property. Other sections in the chapter also support the same view. S. 135 enacts that a purchaser of an actionable claim is not entitled to recover anything more than the price paid by him and the incidental expenses of the sale. Such a restriction was never before placed on the transfer of ownership in moveable or immoveable property; no doubt, a transfer of moveable or immoveable property, if it offended against the law of champerty, was invalid. But where the object was a *bona fide* sale, the fact that a suit would be necessary to recover the property was no objection to the transfer. *Daniel* v. *Hunter*, 4 Ha. 420. On the other hand *choses in action* were at one time absolutely incapable of transfer in England, and "the attempt to make such a transfer involved the guilt of *maintenance* or maintaining another in his suit." The law afterwards allowed, though only gradually, the transfer of *choses in action*, and at present, even the restriction introduced by S. 135 does not exist there[2] although attempts have been recently made to limit the assignee's right to the

[1. Shares etc., are now excluded by S. 137 from the operation of Chapter VIII of the T. P Act :—ED.]

[2. This represents now the law in India by the Amendment Act VI of 1900 :—ED.]

amount paid by him where he is an agent, trustee, heir at law, or executor (Coote, on *Mortgages*, Vol. I pp. 770-72, 5th Edn.) A provision analogous to S. 135 existed in the Roman law. "To prevent speculators from purchasing debts at low prices and exposing debtors to vexatious prosecutions, the Emperor Anastasius ordained that the assignee should not be *entitled to exact [* 292]
from the debtor more than he himself had paid to acquire the debt, with interest. This rule was adopted and confirmed by a constitution of Justinian." But it was limited to 'obligations for payment of money or delivery of fungibles' and was not applicable to a thing *in specie*—Mackenzie's *Roman Law*, p. 247. A similar provision is to be found in the Code of Lower Canada from which the section in Indian Act was taken. See Weir's Civil Code, of the Province of Quebec, Book III, Tit. 5 Ch. X, S. 3, No. 1582, pp. 219, 220. The chapter in which it occurs treats of the sale of *debts and other incorporeal things*. The section is in the same words as S. 135 of the Indian Act, except that we have 'litigious right' for *actionable claim*. A litigious right is defined to be "a right which is uncertain or disputable by the *debtor*, whether an action for its recovery is actually pending or likely to become necessary." This definition also is not free from vagueness, but the word *debtor* occurring in it shows that the definition was not intended to comprise rights *in rem*. It is hardly probable thatthe Indian legislature intended to extend the restriction, especially as we are aware that the chapter was at first headed 'Transfer of Debts.' Clause (*d*) of the section itself supports this conclusion. It excepts from the provisions of the section cases "where it is made to the possession of a *property subject to the actionable claim*." The italicized expression shows that ownership in property itself is not an actionable claim. Further the word *discharged* is hardly applicable to rights *in rem*. See *Modun Mohun Dut* v. *Fattarunnissa*[1].

S. 131 also tends to support the view that 'actionable' claim does not include ownership in property. It prescribes the mode of transfer of debts and beneficial interest in moveable property, these being the chief classes of rights *in personam*, with the exception of rights to damages arising from breaches of contract or tort.

1. (1885) I.L.R. 13 C. 297.

Proceeding now to the cases on the point, they are in accordance with the view maintained here. In *Modun Mohun Dut* v. *Futtarunnissa*[1] the Calcutta High Court, after an elaborate examination of the provisions of the Transfer of Property Act, held that ownership in immoveable property, not in the possession of the owner, is not an actionable claim, and that Chapter VIII refers to nothing more than to a transfer of a *claim*, " but " they say, " if the transfer be that of the ownership of property, it is something more than the transfer of a claim " although where the right to property is merely accessory to a *claim*, it would be an actionable claim, such as a hypothecation right over immoveable property. See also *Ramachendra* v. *Venkatarama*[2]. The principle was applied to moveable property by the Madras High Court in *Ramakrishna* v. *Kurikal*[3] In *Rajanikanth Nag Rai Chowduri* v. *Hari Mohan Guha*[4] where a member of an undivided Hindu family, who had instituted a suit for a declaration that a lease of family property made by his co-parceners was not binding on him, and for possession of his share of the property, sold all his interest therein to a stranger, the Calcutta High Court held that the right sold was an actionable claim, and that the assignee was [*293] not entitled* to recover more than the amount paid by him. On the facts, the decision is not quite reconcilable with the case of *Modun Mohun Dut* v. *Futtarunnissa*[1]. But it proceeded on the view their Lordships took of the assignment. They held that what was transferred was merely a right to set aside the document on the ground that the person by whom it was executed, exceeded his power. They did not hold that the right to property must be held to be an actionable claim, whenever a suit may be neccessary to recover possession of it.

Govind Bin Lakshmanshet Anjorlekar *v.* Dondbarav Bin Ganbarav Tambye.—I.L.R. 15 B. 104.—In this case the Bombay High Court held that the decision in a previous suit of a small cause nature in which there was no right of second appeal was not *res judicata* in a subsequent suit which could be taken up to the High Court, for the declaration of a right which was in issue in the previous suit. This decision merely follows

1. (1888) I.L.R. 13 C. 297.
2. (1890) I.L.R. 13 M. 516.
3. (1888) I.L.R. 31 M. 445.
4. (1885) I.L.R. 12 C. 470.

earlier decisions of the same Court. *In Bholabhai* v. *Adesang*[1] *West* and *Nanabhai Haridas* JJ. expound the principle of the decision at considerable length. Their Lordships consider it unjust that the decision in a case which could not be taken up in second appeal to the High Court, should be binding upon it in a subsequent case which goes up to it for decision. The Bombay High Court does not appear to us to be correct. If the principle of the decision were sound, it would follow that a decision by a Sub-Judge in a suit of the value of less than Rs. 5,000 would not be *res judicata* in a subsequent suit in the same Court involving the same issue but of the value of more than Rs. 5,000 and less than Rs. 10,000, for while in the latter case there would be a regular appeal on the facts to the High Court, in the former there would only be a *second appeal on a question of law alone* to the High Court. Again a decision by a Subordinate or District Judge in a suit of less than Rs. 10,000 but more than Rs. 5,000 in value would not be *res judicata* in a suit of more than Rs. 10,000 in value; for in the latter case there would be a right of appeal to the Privy Council if the findings of fact were not concurrent, while in the former there would be no such right. One might also suggest that the decision in a case in which no appeal lay to the Privy Council merely because the findings of fact in the Courts below were concurrent, would not bar a subsequent suit which involved in addition some substantial question of law. Apart from these consequences which flow from the reasoning of the Bombay High Court, we may observe that there is nothing in the language of S. 13 to warrant the construction placed by the Judges. In the case under consideration the decision pleaded in bar of the action was of "a Court of jurisdiction competent to try the subsequent suit." Mr. Justice *West* proposes the addition of the words "with conclusive effect." It is difficult to understand the meaning of this addition. Even if the first suit could have been taken on second appeal to the High Court, the original Court which tried it could not try the subsequent suit *with conclusive effect.* It is now settled that the Court which has to be considered for judging of *competency* is the original Court, see *Misir Raghobardial* v. *Sheo Baksh Singh*[2]. In the case under notice the original Court which tried the first suit was competent to try the subsequent suit. There is no warrant in the Code for* the principle which underlies the decision of the Bombay Court that a higher Court shall not be estopped by the [*294]

1. (1884) I.L.R. 9 B. 75. 2. (1882) I.L.R. 9 C. 439 (P. C.)

decision of a lower tribunal. For if this were sound we should have to hold that where a suit or appeal is transferred by the High Court to its own file from a lower Court, it would not be bound by a previous decision of a lower tribunal which would operate as *res judicata* in such lower Court. We may also suggest a further difficulty in accepting the view of the Bombay High Court. Suppose a suit for interest on a bond brought first in the Presidency Small Cause Court and decided. A subsequent suit for the principal which is over Rs. 500 but within the pecuniary jurisdiction of the Small Cause Court is brought in the regular Court from which a second appeal would lie to the High Court. It is clear that the Small Cause Court could try the subsequent suit *with conclusive effect.* And yet this is hardly the result to which the reasoning of the learned Judges in *Bholabhai* v. *Adesang*[1] would lead though the suggestion of the addition of the words "with conclusive effect" was intended to save the higher Court from the bar arising from the decision of a lower tribunal.

We may refer in support of our view to the decision of *Wilkinson* J. in *Singara Chariar* v. *Krishnasawmy*,[2] who held distinctly, though there is no reference in his Lordship's judgment to the Bombay case of *Bholabhai* v. *Adesang*[1] that the decision in a prior suit, of a small cause nature which was not taken up on second appeal to the High Court was *res judicata* in a subsequent suit triable by the former original Court, which came up to the High Court.

The decision of the Privy Council in *Krishna Behari Roy* v. *Brojeswari Chowdranee*[3] seems also to support our view though the point in question appears to have been assumed. There the first case had gone up to the High Court in second appeal while the subsequent suit went up to that tribunal as a regular appeal. The Privy Council did not regard this circumstance as affording justification for the view that the decision in the first suit could not be *res judicata* but held it to be a bar as the original Court in the first case was competent to try the subsequent suit. This was a decision under Act VIII of 1859, S. 2. But since the case of *Mussamut Edun* v. *Mussamut Bechun*,[4] the law therein laid down has been treated as expounding the same principles as the later enactment of 1877, or even the Code of 1882.

[The view taken by the Bombay Court in this case has after some fluctuations of opinion been adopted by a Full Bench of

1. (1884) I.L.R. 9 B. 75.
2. (1888) 1 M.L.J. 313 at 319.
3. (1875) L.R. 2 I.A. 283.
4. (1867) 8 W.R. 175.

the Madras Court. See *Avanasi Gounden* v. *Nachammal*[1]. The prior decisions of the Madras Court are referred to and noticed in the above Full Bench case. The Calcutta Court takes a contrary view. See *Bhugwanbutti* v. *Forbes*[2] following *Rai Charan Ghose* v. *Kumud Mohun Dutt*[3]. The present Code has by Expln. II to S. 11 settled this conflict by adopting the view taken in the Madras Full Bench case:—ED.]

Bikutti v. Kalendan.—1 M. L. J. 227.—We are accustomed to a considerable degree of laxity in the application of the provisions of the Civil Procedure Code to Malabar. But the decision in *Bikutti* v. *Kalendan* goes probably beyond any reported case. In this case *Shephard and Handley* JJ. hold that a junior member of a tarwad is entitled to institute a suit for the recovery of family property alienated by the manager, on the ground that the alienation was not for a purpose binding on the family. They hold that as the manager himself could not recover property alienated by him "except at the suit of a junior member the tarwad right could not be asserted," and therefore a junior member by himself without joining the other members of the tarwad may sue to recover tarwad property. Assuming that the karnavan is disabled from suing by having made the alienation, it is difficult to see how it follows that one or a few of the *junior members alone can be permitted to sue for recovery of the [*295] property. The right to the property vests in all the members of the family, and the cause of action therefore is one common to them all. One or a few of them therefore cannot, one would suppose, maintain a suit on his or their own behalf and they cannot sue on behalf of themselves and the other members of the family without obtaining the sanction of the Court under S. 30, C.P.C. In *Moidin Kutti* v. *Krishnan*[4] the Madras High Court has held that members of a Nair tarwad have certain individual rights with respect to tarwad property, that one of them has the right to prevent improper alienation, and that, therefore, every member has a right to obtain a declaration that an alienation by the manager is against the interests of the family, and therefore not binding on it, but that this right is one to a mere declaration that the alienation cannot affect his rights. It cannot be pretended that a junior member has a right to *possession* of tarwad property. That right vests in the whole family or rather in the manager

1. (1905) I.L.R. 29 M. 195.
2. (1900) I.L.R. 28 C. 78.
3. (1898) I.L.R. 25 C. 571.
4. (1887) I.L.R. 10 M. 322.

on behalf of the family. In the case of *Moidin Kutti* v. *Krishnan*[1] the judges held that though a suit for a declaration might be maintainable by some alone of the members, it is advisable to bring all the members of the family, on record, as otherwise the decision would not bind those not parties to the suit. If the decision now under notice be right, it will be open to members who have not joined in the suit, if it fails, to institute a fresh suit for recovery of the tarwad property. The manager of a Hindu family has a right, it may be, to institute suits and defend them on behalf of the whole family, but a member, who is not the manager cannot, except with the leave of the Court, do so—*Arunach l* v. *Vythialinga*[2]. Why should it be different in the case of a Malabar tarwad?

[Where the kanom is granted to a member of the tarwad and the property still remains in the possession of the karnavan the junior member is bound only to sue for a declaration that the kanom is invalid. But if it is granted to a stranger who remains in possession thereon the junior member must sue not merely for a declaration that the kanom is invalid but also for possession. *Padammah* v. *Themana Ammah*[3]:—ED.]

[*357] ## * NOTES OF INDIAN CASES.

Hakim-un-Nissa v. Deonarain:—I.L.R. 13 A. 102.— Where a mortgagee of immoveable properties by conditional sale, who had obtained an order for foreclosure under Reg. XVII of 1806, but had not obtained a decree for possession, transferred his right in the property to a third person for a very small sum owing to his inability to a file a suit to enforce his rights against the property, and the transferee sued the transferor and the mortgagor for possession of the property: *Held*, (1) that the latter could not dispute the validity of the transfer on the ground that it was an unconscionable bargain, when the vendor by his plea had admitted the fairness of the transaction; (2) that the right purchased by the plaintiff was an actionable claim. While the
[*358] law of India does not recognize the law of champerty *and maintenance as administered in England, it has enacted by S. 135, Act IV of 1882, that a person who takes a transfer of property under such circumstances shall not recover more than the amount paid by him and the incidental expenses of the transfer. *Jani Begam* v. *Jahangir Khan*[4] followed; *Grish Chandra* v. *Kashi-*

1. (1887) I.L.R. 10 M. 322.
2. (1882) I.L.R. 6 M. 27.
3. (1894) I.L.R. 17 M. 232.
4. (1887) I.L.R. 9 A. 476.

sauri Debi[1] and *Khosh Deb Biswas* v. *Satar Mondol*[2] dissented from. (The decision is opposed also to the view taken in *Ramakrishna* v. *Kurikal*[3] and *Modun Mohun Dut* v. *Futtarunnissa*[4]. Cf. also *Subbammal* v. *Venkatarama*[5], where the Calcutta decision is followed).

[See Critical Notes on this case 1 M.L.J.p. 289 :—Ed.]

Ramphul Tiwari *v.* **Badrinath**:—I.L.R. 13 A. 109.—When property purchased in 1853, from a Hindu widow, had been confiscated in 1858, for the rebellion of the purchasers, and afterwards conferred on third persons, a suit in 1886 within 12 years from the widow's death, by a reversioner, alleging that the sale by the widow operated to confer only her life interest on the transferee was barred under S. 20, Act IX of 1859, by which all rights in respect of the property seized would have to be asserted by suit within 1 year from the seizure.

[See *Mohummud Buhadoor Khan* v. *The Collector of Bareilly*[6] which is quoted in this case :—Ed.]

Harijulal Singh *v.* **Muhammad Raza Khan**:—I. L. R. 13 A. 199.—Where an attachment was made of a judgment-debtor's interest in certain property, describing it as *Zamindari* interest and a sale took place in pursuance of the attachment and a sale certificate was granted of the *Zamindari* interest, but the judgment-debtors possessed no *Zamindari* interest but *Muafi* interest ; the claim of a person, who purchased the *Muafi* interest subsequent to the attachment and before the sale referred to, must prevail against that of the auction purchaser, who cannot be held to have attached the *Muafi* interest.

Kallu Rai v. Fahiman :—I. L. R. 13 A. 125:—When an application under S. 306, C.P.C., that the decree may be amended so as to bring it into conformity with the judgment is granted, it does not give a fresh period of limitation to the decree-holder for the execution of the decree, nor is such an application a "step in aid of execution of the decree" within Art. 179, Sch. II, of the Limitation Act. See *Pydel* v. *Chathappan*[7].

[The date of amendment does not give a fresh starting point. See also *Daya Kishan* v. *Nanhi Begam*[8] ; *Muhammad Umar-*

1. (1886) I.L.R 13 C. 145
2. (1888) I.L.R. 15 C. 436.
3. (1888) I.L.R. 11 M. 445.
4. (1886) I.L.R. 13 C. 297.
5. (1886) I. L R. 10 M. 289. apparently overruled in *Nilakanta* v. *Krishnasami* (1890) I.L.R. 13 M. 225.
6. (1874) L. R. 1 I. A. 167.
7. (1890) I.L.R. 14 M 150
8. (1898) I.L R. 20 A. 304.

jan Khan v. *Jinat Begam*[1]; and *Aksan-Ullah* v. *Dakkhini Din*[2]. But see *Kali Prosunno Basu* v. *Lal Mohun Guha*[3] and *Muhammad Suleman Khan* v. *Muhammad Yar Khan*[4]. Cf. also *Kotaghiri Venkata Subbamma Rao* v. *Vellanki Venkatarama Rao*[5].—ED.]

Bishambar Nath *v.* Imdad Ali Khan:—I.L.R. 18 C. 216.—S. 266 (*g*), C.P.C., includes all pensions of a political nature payable directly by the Government of India, although probably it was not meant to cover pensions payable by a foreign state, when remitted for payment to their pensioner in India. A pension which the Government of India has given a guarantee that it will pay, by a treaty obligation, contracted with another sovereign power, is in the strictest sense, a 'political pension' as the obligation to pay as well as the actual payment of the same may be ascribed to reasons of State policy. A monthly allowance payable to a person, by the Indian Government, under an arrangement made between the King of Oudh and the Governor General of India is not liable to be taken in execution for that person's debts.

[Such a pension is not attacheable as long as it remains unpaid in the hands of Government irrespective of whether the person entitled to the same is alive or dead. See *Valia Thamburatti* v. *Anujani*[6]. Cf. also *Muthusami Naidu* v. *Prince Alagia*[7]:—ED.]

[*359] ***Jarao Kumari *v.* Salonmoni**:—I.L.R. 18 C. 224: L.R. 17 I.A. 145:—*Held* that a map made at a Revenue Survey, under Government orders, could not be presumed to be correct, under S. 83 of the Evidence Act as regards the nature and the extent of the different kinds of lands mapped, as the maker of the map had authority only to lay down, and map, the boundaries.

[They are however valuable evidence of the state of things at the time they are made and are as such admissible[7]—*Jagadindra Nath Roy.* v. *Secretary of State*[8]. See *Raj Kumar Paul* v. *Basanta Kumar Guha*[9] and *Abdul Hamid Mian* v. *Kiran Chandra Roy*[10] where the Privy Council decision under notice is explained:—ED.]

Soshee Bhusan Rudro *v.* Gobind Chund Roy:—I. L.R. 18 C. 231.—Although parties themselves cannot extend the

1. (1903) I.L.R. 25 A. 385.
2. (1905) I.L.R. 27 A. 575 (577, 578).
3. (1897) I.L.R. 25 C. 258.
4. (1894) I.L.R. 17 A. 39.
5. (1900) I. L. R. 24 M. I.: s. c. L R. 27 I.A. 197.
6. (1902) I.L.R. 26 M. 69.
7. (1902) I.L.R. 26 M. 423.
8. (1902) L.R. 30 I.A. 44: s.c. I.L.R. 30 C. 291.
9. (1902) 7 C.W.N. 612.
10. (1903) 7 C.W.N. 849.

time allowed for doing an act in Court, yet if the delay is caused not by any act of their own, but by some act of the Court itself—such as the fact of the Court being closed—they are entitled to do the act on the first opening day. And although there is no express mention of such a right in S. 174 of the Bengal Tenancy Act, while there is such mention made in a similar case in S. 66, *held*, the general principle applied to S. 174 also and the legislature could not be taken to have intended to make any change in the general principle.

[See also *Peary Mohun* v. *Anunda Charan*[1]; *Surendra Narayan* v. *Souraoni Dasi*[2]; *Aravamudu Ayyangar* v. *Samiyappa Nadan*[3]; *Sambasiva Chari* v. *Ramasami Reddi*[4] .—Ed.]

The Secretary of State for India *v.* Fazal Ali:—I.L.R. 18 C. 234.—In a suit for recovering the surplus sale proceeds of a sale for arrears of Government Revenue held by the Collector "in *deposit on account of the proprietor, &c.*, to be paid on *demand*." *Held* (1) Art. 62 of Sch. II. of the Limitation Act is appliciable, as the surplus proceeds come into the Collector's hands for the *use* of the proprietor; (2) the Collector is not a 'depository' and Art. 145, does not apply to this case, as it refers to cases of deposits in *specie*; (3) the Collector is not a trustee, under S. 10 of the Limitation Act as the money was not *vested* in him for the benefit of a third person.

[This case has been overruled by the Full Bench case of *The Secretary of State for India in Council* v. *Guru Proshad*[6] where the majority of the Full Bench held that Art. 120 and not Art. 62 was applicable to such a case. But a claim by the mortgagee for satisfaction of the mortgage-debt out of the sale proceeds of the mortgaged property sold by the Collector for arrears of revenue is governed by Art. 132 and not 130 of the Limitation Act. See *Upendra Chandra* v. *Mohri Lal*[5]:—Ed.]

Hafez Mahomed Ali Khan *v.* Damodar Pramaneck:—I. L. R. 18C. 242.—A decree-holder, though he applied for rateable distribution of the sale proceeds of the judgment-debtor's property after sale takes place at the instance of another decree-holder, and after the deposit of twenty-five per cent. was made, is entitled to participate in the same, 1st, as the 25 per cent. is not "assets" within the meaning of S. 295, C.P.C., but a mere deposit and not immediately available for payment, and the clause "whenever assets are realized" means, when they are realized so

1. (1891) I.L.R. 18 C. 631.
2. (1906) 3 C.L.J. 339 S.C. 10 C.W.N. 535.
3. (1898) I.L.R. 21 M. 385.
4. (1898) I.L.R. 22 M. 179.
5. (1892) I.L.R. 20 C. 51.
6. (1904) I.L.R. 31 C. 745 at 751.

as to be available for distribution among the decree-holders, and 2ndly, as his application was made before the money was *realized*, he was held also entitled to share in the remainder of the sale proceeds. *Jogendro Nath Sircar* v. *Gobind Chunder Addi*[1] questioned by *Trevelyan* J.

[This question was raised but not decided in *Ramanathan Chettiar* v. *Subramania Sastrial*[2].—ED.]

In the matter of Wilson.—I.L.R. 18 C. 247.—The High Court has full jurisdiction to entertain and deal with an application for transfer of a criminal case from the Court of a Magistrate, in the Sonthal Pergannas, a scheduled district, when the accused is a European British subject. A transfer is expedient, if there are circumstances which might reasonably lead the petitioner to believe that the Magistrate had, to some extent, prejudged the case against him and he would in consequence be prejudiced in the trial.

[On the latter point, see *Baktu Singh* v. *Kali Prasad*[3] and *Kali Charan Ghose* v. *Emperor*[4] :—ED.]

[*360] ***Rahimbhoy Habibbhoy v. C. A. Turner**:—I.L.R. 15 B. 155 : 18 I. A. 6.—In a suit for the balance due on an account in which the defendant contended that no account should be taken at all and that he was not liable to plaintiff, the High Court by its decree directed that accounts should be taken. A petition to the High Court for leave to appeal to Her Majesty against the said decree, was refused, on the ground that the decree was not 'final.' On a petition to Her Majesty, for an exercise of the prerogative of the Crown to admit an appeal : *Held* (1) the petition was perhaps a more convenient one, than one by way of appeal against the order of refusal, as then leave could be granted on any other ground, should any appear, besides the ground that the Court has refused the certificate without good cause ; (2) the decree directing the taking of accounts was final within the meaning of S. 595, C.P.C., as the decree affirmed the liability of the defendant to pay what might be found to be due to plaintiff as the result of taking the accounts, and as the account was only a consequence of the liability.

[See upon this latter point *Shantaram* v. *Jamsetji*[5] ; *Saiyid Muzhar Hossein* v. *Mussamat Bodha Bibi*[6] ; *Chundi Dutt* v.

1. (1885) I.L.R. 12 C. 252.
2. (1902) I.L.R. 26 M. 179 (181) [Per *White*, C. J.]
3. (1900) I.L.R. 28 C. 297.
4. (1906) I.L.R. 33 C. 1193.
5. (1902) 4 Bom. L. R. 212.
6. (1894) I. L. R. 17 A. 112 (P.C.)

Pudmanund Singh[1] (where an order refusing the appointment of a receiver was held not to be final within the meaning of the section). See also *Habibunissa* v. *Munwarunnissa*[2]; *Mujtaba Hussain* v. *Jamalud-din*[3] ; *Sunder Koer* v. *Chandishwar*[4]: see further *Radha Kishan* v. *The Collector of Jaunpur*[5].—ED.]

H. H. Syed Ali *v.* **A. Adib.**—I. L. R. 15 B. 161.—The defendant in a suit was arrested before judgment, on the application of the plaintiff, but was discharged. Summons was not served on him to defend the suit. On the date of hearing, the plaintiff applied for leave to withdraw the suit, with liberty to bring a fresh one. The defendant appeared and objected: *Held* (1) that though summons was not served on him, as he was once brought before the Court by the plaintiff under a legal process he was entitled to appear at the hearing and object to the withdrawal; (2) that defendant was entitled to compensation under S. 491, C. C. P., as it is unquestionably an injury to be publicly arrested and detained for some time by the sheriff.

Liladhar Shamji *v.* **Rehmubhoy Allana.**—I. L. R. 15 B. 164.—At common law, and where the taking of a poll is not governed by statute or special rule, the chairman of a meeting is the proper authority to fix the time and place for the taking of a poll; and a poll is properly and conveniently taken immediately after the termination of the meeting. There is no reason why the same rule should not apply to meetings of registered companies, unless their articles prescribe some other procedure. The object of a poll in the case of a meeting of members of a registered company, as of other meetings, is to ascertain the true sense of the meeting and is not to give absent members a further opportunity of voting, unless a contrary intention is expressly or impliedly to be gathered from the articles of association. There is no presumption in construing a doubtful article in the latter sense. One of the articles of a company ran as follows: "Every shareholder who has been duly registered for three months previous to the general meeting shall be entitled to vote at such meeting and shall have one vote in respect of every share held by him." *Held*, that according to this article, the registration of a shareholder for three months, is a condition precedent for the exercise of his right to vote, but the number of votes depends on the number of shares held on the day of meeting and it is not necessary,

1. (1895) I. L. R. 22 C. 928.
2. (1903) I. L. R. 25 A. 629.
3. (1904) I.A.L.J. 26.
4. (1903) I.L.R. 30 C. 679 (where, however, the point was not decided.
5. (1900) I.L.R. 23 A. 220 ; 8 C.L.R. 28 I.A. 28.

that each share should be registered for three months, and such
[* 361] a restriction contained in Table A to * the Companies Act is arbitrary, and introducing the same into this article involves a departure from its plain meaning, which is only allowable when it is sought to avoid an illegality, inconsistency or manifest absurdity.

Lakshuman Giriraya Naik v. Madhav Krishna Shenvi:—I. L. R. 15 B. 186.—Three undivided brothers mortgaged their lands to the defendant. Afterwards they divided. The defendant allowed two brothers to redeem their shares and thus recovered ⅔rds of a sum of money which he said he had been obliged to pay as assessment on the properties, when the remaining ⅓rd share was sought to be redeemed. Plaintiff sued to redeem his ⅓rd share and alleged that defendant had not really paid anything for assessment, and that he was therefore entitled to deduct the excess amount collected by defendant from his co-mortgagors. *Held*, that the mortgagors having severed their interest, and the plaintiffs' right to redeem being perfectly distinct from that of his co-mortgagors, he was not entitled to the deduction.

Queen-Empress v. Abaji Ramchandra.—I. L. R. 15 B. 189.—One *X* was convicted, under S. 475 of the Indian Penal Code, of being in possession of forged documents, by the Sessions Court. Certain suspicious documents in the possession of a witness for the defence, who belonged to the same faction as the accused, were admitted in evidence in the Sessions Court and the jury were charged that those papers should be taken into consideration as showing the extent to which the practice of forgery prevailed in the village and consequently tending to show a guilty knowledge on the part of the accused. *Held*, that those papers were inadmissible as evidence and the direction to the jury about them were wrong and must necessarily have prejudiced the accused and the conviction could not therefore, be supported. *Held* further, that the charge should have distinctly specified the particular papers bearing a counterfeit mark or device which it was alleged that the accused was in possession of with the intent mentioned in the section, and evidence should then have been admitted in respect of those papers alone.

[See *Emperor* v. *Debendra Prosad*[1] where all the cases are referred to.—ED.]

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1. (1909) I L.R. 36 C. 573.

* SUMMARY OF ENGLISH CASES. [* 351]

Adams *v.* Great North of Scotland Railway Co.

[1891] A. C. 31.

Arbitrator's award—Setting aside—Scotch Act of Regulations, 1695, S. 25.

An arbitrator's award may be set aside where he exceeds his jurisdiction, or disregards any one of the expressed conditions of the submission, or the conditions implied by law, or is guilty of misconduct in the course of the reference or in the making of the award. S. 25 of the Scotch Act of Regulations did not change the law in this respect.

Murugaser Marimuttu *v.* Charles Henry DeSoysa.

[1891] A. C. 69.

Right of purchaser in sale by mortgagee—Ejectment—Altering nature of suit.

The plaintiff purchased certain property and promised to pay all sums due to a mortgagee of it. The latter took certain proceedings under which the estate was sold and defendant became the purchaser. Plaintiff sued to eject the defendant. *Held* (1) that supposing the sale brought about by the mortgagee did not affect the plaintiff's rights to the property, and that he was entitled to it, the defendant was entitled to all the rights of the mortgagee and plaintiff could not recover the estate without paying off the amount due to him, and (2) that in a case like this, the plaintiff should be held strictly to the relief prayed for by him and could not be allowed to redeem, especially as in this case there were reasons to suppose that the plaintiff did not wish to redeem.

Jenoure *v.* Delmege. [1891] A. C. 73.

Libel—Privileged communication—Burden of proof.

The defendant, a Justice of the Peace of Portland in Jamaica, wrote a letter to the Inspector of Constabulary, Port Antonio, regarding what he considered improper neglect of duty on the part of the * plaintiff, a medical officer of Portland. The plaintiff sued the defendant for libel. The defendant contended *inter alia* [* 352] that the occasion of the publication was privileged. The Chief Justice of Jamaica directed the jury that the existence of privilege depended on whether the defendant *bona fide* believed the statement to be true, and that it lay upon him to prove that it was so, holding that there was a distinction between cases where a

person volunteers information on the ground of duty and those where there is a certain relationship between the parties, as that of master and servant.

Held by the Privy Council that no distinction can be drawn between one class of privileged communications and another; that in all cases of qualified privilege, the occasion rebuts the inference of malice, and it lies on the plaintiff to prove malice in fact. The verdict was, therefore, set aside for misdirection and a new trial ordered.

Coventry's Case. [1891] 1 Ch. 202.

Company—Nominal allotment of shares—Application on behalf of third person—Liability of agent.

By a resolution of the Directors of the Britannia Fire Assurance Company, it was agreed that the shares of the Company, which had not yet been taken up, should be allotted in the names of the friends of the Directors, until the public should apply for them, but that the allottees should not be real shareholders, or be liable on the shares allotted. 200 shares were accordingly allotted in the name of Samuel Coventry, the son of Mills Coventry, one of the Directors, the application for the shares having been signed by the latter for the former. Samuel Coventry was totally unaware of the application, or of the registration of the share in his name; no certificate of shares was issued, and nothing was ever paid on them. The Company was subsequently voluntarily wound up. Both Mills and Samuel Coventry having died, the liquidator placed Mill's executors on the list of contributories in respect of the shares. *Held*, on a summons by the executors to have their names removed from the list, that as there was really no contract on the part of Mills Coventry to take the shares, but the whole was a sham procedure on the part of the Directors to induce the public to believe that all the shares had been taken, his executors could not be put on the list of contributories.

Per Lindley, L. J.—The action of the Directors was a gross fraud, for which those who took part in it were jointly and severally responsible.

In re **Lashmar: Moody v. Penfold.**
[1891] 1 Ch. 258.

Trustee of equitable estate—Death of beneficiary—Right of trustee to call for legal estate—Bare trust.

Under the will of *P*, *C* was entitled to an equitable reversion in fee in certain property, the legal estate being in one *W* the surviving trustee of *P*'s will. *C*, who died in 1868, demised all his estate to *M* and another, upon trust to pay to his wife, or to permit her to receive the annual produce thereof during her life or widowhood, and after her death or second marriage, upon trust for his son *D* and his heirs. *C* authorized the trustees, with his wife's consent, and after her death and during the minority of his son, in their discretion, to sell any part of the estate, if necessary. *C*'s wife and son both died before the reversion fell due (in 1889). *M*, the surviving trustee *of *C*'s will, claimed to have [* 353] become absolutely entitled to the property, and called upon *W*, who was in possession as surviving trustee of *P*'s will, for a conveyance thereof. *Held* by the Court of Appeal that although *M* was the legal owner of *C*'s estate under *C*'s will during the lifetime of his widow, he having no duty whatever to discharge after her death, the trust became a bare trust, and *M* could not recover the estate. If he had any duties to perform in connection with the estate, he would be entitled to recover it from *W*.

Simmons *v.* London Joint Stock Bank.

[1891] 1 Ch. 270.

Stock-broker—Authority to pledge securities—Negotiable instruments—Bona fide holder.

S entrusted *D* with bonds of a foreign Company, payable to bearer and transferable by delivery. *D* sold them for his own purposes without *S*'s authority, but purchased others of the same kind and value and entered them in his books as belonging to *S*. He then pledged the latter, along with securities belonging to other customers, with the defendants to cover a debt of his own. *D* having become insolvent, the defendants sold the securities deposited with them to realise the debt due to them. *S* claimed the return of the bonds or their value.

Held (1) that the bonds purchased by *D* having been substituted for those originally deposited with him, became the property of *S* before their deposit with the defendants; (2) that on the facts the defendants did not believe that *D* had authority to pledge the plaintiff's bonds *en bloc* with securities belonging to others to raise a loan on the whole, and that supposing the bonds were *negotiable securities*, the defendants were not *bona fide* holders of them without notice; (3) that an authority by a customer

to pledge his securities does not include an authority to pledge them *en bloc*.

Per Curiam.—A document may be transferable by delivery, so as to enable the transferee to enforce all the rights of the transferor against the original contracting party, but it may not be yet a negotiable instrument because the transferee acquires by mere delivery no better title than the transferor. The holder of a negotiable instrument, if he is a *bona fide* holder for value without notice, has a good title, notwithstanding any defect of title in the person from whom he took it.

Morgan *v.* Blyth : Smith *v.* Blyth : Blyth *v.* Fladgate. [1891] 1. Ch. 337.

Breach of trust—Negligence of solicitor—Liability of partners.

The sale proceeds of certain Exchequer Bills subject to the trusts of a settlement were paid to the account of a firm of solicitors at their bankers. All the trustees of the settlement had died. One of the beneficiaries wrote to *S*, one of the solicitors of the firm, to advise the trustees regarding the propriety of investing the trust funds in certain mortgage. *S*, acting for the firm, made inquiries and after having at first advised against the investment, subsequently changed his opinion and in accordance with his advice the investment was made, the mortgage being taken (in the absence of existing trustees) in the names of *S* and two others who were afterwards appointed trustees, and who did not repudiate the investment. The security proved to be insufficient, and in an action by the beneficiaries, the investment [* 354] was * declared to be a breach of trust, and *S* and his co-trustees were held jointly and severally liable for the loss. The beneficiaries now sought to make the partners of *S* liable for the negligence of the firm in the matter of the investment. *Held* (1) that although *S*'s partners had no personal knowledge of the property at the time of the mortgage, *S* having acted in all he did within the scope of his authority as partner, the firm were jointly and severally liable for his negligence ; (2) that the judgment recovered against *S* as one of the trustees was no bar to the present suit, as the liability arising from a breach of the trust is not joint merely, but joint and several, and the rule in *King* v. *Hoare* will not, therefore, apply ; (3) that the liability extended to the estate of a member of the firm since deceased as the action was really one arising *ex contractu* and not *ex delicto*, and was founded on the implied promise on the part of the firm to exercise reasonable skill and care in the performance of their duties as solicitors.

In re Slevin: Slevin v. Hepburn. [1891] 1 Ch. 373.

Charitable gifts—The doctrine of cypres.

A testator by his will after giving a number of pecuniary legacies to various persons continued as follows: "I bequeath the following charitable legacies, namely"—and amongst these was the following:—"To the Orphanage of St. Dominic's, Newcastle-upon-Tyne, 200£." The institution was not organised or endowed. It was maintained by a Mrs. Priestman at her own expense, and was in existence on the date of the testator's death, but discontinued shortly afterwards and before the administration of his assets. *Held* that the legacy being to a private institution, the Court could not apply it *cypres* on the failure of the particular object, and that a general charitable intention could not be inferred from the expression: 'I bequeath the following *charitable* legacies,' the words having been used merely as a convenient mode of grouping together the various particular institutions intended to be benefitted.

Rogers, Sons and Co. v. Lambert and Co.
[1891] 1 Q. B. 318.

Bailor and bailee—Estoppel—Jus tertii.

A bailee of goods cannot resist an action for wrongful conversion of the goods entrusted to him, by proving that the bailor has parted with his title in the goods to a third person, unless he (the bailee) have attorned to that third person, and unless he set up the title of that third person, upon the right and title and by the authority of that person.

County Council of Durham v. Assessment Committee of Chester-Le Street and Churchwardens, &c., for Parish of Witton Gilbert.
[1891] 1 Q. B. 330.

Industrial school—County Council—Liability to poor rates.

An Industrial school vested in a County Council is not exempt from the payment of poor rate, because it is not a building "occupied by the Crown for the purposes of the Crown and for public purposes and by public officials," as in the case of Assize Courts, County Courts, Prisons, &c. The fact that public money was used for the purpose of founding it is not material.

*** Showers v. Assessment Committee of the** [* 355]
Chelmsford Union.—[1891] 1 Q. B. 339.

Exemption from rateability of property occupied for public purposes—Residence of police officers—Beneficial occupation.

A block of buildings called Springfield Court consisted mainly of residences of the Chief Police officers of a county, for which they paid rent, but partly also of a parade room and other public officers which were not rateable. The whole was under one roof and enclosed by a wall. *Held* that Springfield being not a single building used for the purposes of a police station, but divided into tenements, the premises occupied as residences did not fall within the class of property occupied for the purposes of the government of the country, and that they were rateable to the relief of the poor.

The Queen v. Vereones. [1891] 1 Q. B. 360.

Manufacture of evidence—Attempt to corrupt justice.

The manufacture (or fabrication) of false circumstances to mislead a judicial tribunal which might come into existence (*e.g.*, arbitrators) is an indictable misdemeanour although such evidence may not afterwards be actually used. Where an agent abstracts samples of wheat from sealed bags and substitutes better samples, and sends them up to be used as evidence before arbitrators who were to settle possible differences between the contracting persons, the agent having done all he could to corrupt the evidence upon which the judicial tribunal was likely to act, he was held by *Lord Coleridge*, C. J., *Pollock* B., and *Stephen, Charles, and Lawrence*, JJ. (on a case stated by *Denman* J.) that he was guilty of misdemeanour, although the evidence was not actually used. (The same view would seem to hold good with reference to S. 192, of the Indian Penal Code).

The Queen v. Assessment Committee of St. Mary, Abbotts, Kensington, [1891] 1 Q. B. 378.

Union Assessment Committee Act—Right of objector to appear by agent.

By S. 19 of the Union Assessment Committee Act, the Assessment Committee is bound to hold meetings for hearing the objections of any person who might give notice of objection to the valuation of the Committee. The Committee refused to hear the *agent* nominated by an objector, and the objector applied for a mandamus to compel the Committee to hear the agent. *Held* (1) that the Committee were bound to hear the agent; (2) that the Committee were merely a certain number of persons empowered by Statute to hear and decide objections to valuation, and not a Court or a tribunal exercising judicial functions in the legal

acceptation of the term, and possessing as such a right to regulate their own procedure.

Vernon and others *v.* Watson. [1891] 1 Q. B. 400.

Friendly Societies Act, 1875—*Conviction for misappropriation —Imprisonment for default of payment—A bar to remedy by action.*

By Sub-S. 9, S. 16, of the Friendly Societies Act 38 & 39 Vict. C. 60, any person misappropriating any property of a society is liable on summary conviction at the instance of the Society to a penalty, and to an order to repay the amount misappropriated and, in default of payment, to be imprisoned. The defendant was convicted under the Act for misappropriation and ordered to repay the money and to *pay a penalty. He failed to comply with [* 356] the order for payment and was imprisoned. The trustees of the Society sued to recover by action the amount which the defendant ought to have paid. *Held,* that the conviction and punishment under the Statute was a bar to the remedy by action.

The South Staffordshire Tramways Co., Ld. *v.* The Sickness and Accident Assurance Association, Ld. [1891] 1 Q. B. 402.

Computation of time—Insurance from a date.

Held that an insurance against claims for injuries in respect of accidents, for twelve calendar months *from* November 24, 1887, excludes Nov. 24, 1887, and includes Nov. 24 of 1888.

In re **Solty Koff**: *Ex Parte* **Margarett.** [1891] Vol. 1 Q. B. 413.

Infant—Infants' Relief Act—Necessaries—Bill of exchange.

An infant cannot make himself liable by the acceptance of a bill of exchange, even if the bill was given for the price of necessaries supplied to him. But a person who has supplied an infant with necessaries can sue for the price of what he has supplied.

Barrow *v.* Isaacs & Son. [1891] 1 Q. B. 417.

Landlord and tenant—Breach of covenant not to underlet without landlord's consent—Relief against forfeiture—Mistake—Negligence.

The lessee of certain premises covenanted not to underlet without the consent of the lessor, who agreed that the consent

should not be arbitrarily refused. The lessor had the right of re-entry in case the lessee did not "well and truly observe and perform" the covenants of the lease. The lessees underlet part of the premises without obtaining the lessor's consent, owing to an inadvertence on the part of the lessee's solicitor, who in preparing the underlease omitted to look at the head lease and forgot the condition requiring the lessor's consent to underlet. The lessor admitted that he could have had no valid objection to the underlease if his consent had been asked. The lessor sued to recover possession for breach of the covenant:—

Held by the Court of Appeal that the defendant having committed a breach of the covenant the plaintiff was entitled to recover.

Per *Lord Esher*, M. R.—(1) The ignorance of the lessee's solicitor (owing to forgetfulness) that the lessor's consent was required for underletting was not 'mistake' in the sense in which Courts of Equity understand the expression. 'Mistake' involves the assumption that one state of things exists, whereas some other state of things exists, and not a mere passive state of mind, like forgetfulness. (2) If there were mistake in the case, the forfeiture might be relieved against as the negligence (of the agent) which caused the mistake did no harm at all to any one. It cannot be laid down as a universal proposition that a Court of Equity will not relieve against mistake if the mistake is the result of the negligence of the person asking for relief.

Per *Kay*, L. J. (*Lopes*, L. J. concurring).—(1) Equity will not relieve against the consequences of mistake where it is due to the negligence of the person asking for relief. (2) Mere forget-
[* 357] fulness might amount to mistake in some cases. (3) It is not strictly correct to speak of the right of re-entry of a landlord in such a case as a "forfeiture."

Per *Curiam*. In the expression "well and truly observe and *perform* all the covenants" *perform* does not refer to positive covenants alone.

Swift *v.* Swift. [1891] P. 129.

Restitution of conjugal rights—Settlement out of wife's property—What sums to be taken into account.

When a decree for restitution of conjugal rights has not been complied with by the wife: *Held*, that the Court in exercising its discretion to order a settlement out of the wife's

property for the benefit of the husband may take into consideration the general conduct of the parties. In ascertaining the amount, the Court will not go into a minute account of the sums spent by either party on household expenses, but the chance of the husband being able to earn an independent income should be taken into account; the Court ought to make a deduction also if the wife has advanced a loan to the husband.

Redfern *v.* Redfern. [1891] P. 139.

Affidavit of documents—Criminatary—Infant—Divorce suit.

The rule in *Mayor* v. *Collins*[1] that an infant cannot be compelled to make on affidavit of documents does not apply to proceedings for divorce. A party cannot be compelled to discover that which if answered would tend to subject him to any punishment, penalty, forfeiture, or ecclesiastical censure. As adultery exposes a person to ecclesiastical censure, discovery may be resisted on that ground. Discovery ought not to be granted when it is sought only to prove such party guilty of adultery.

Quaere:—Whether an order for discovery cannot be made against an infant in proceedings for divorce.

Lander *v.* Lander. [1891] 1 Q. P. 161.

Bare maintenance—Insertion of clause as to chastity and single life.

In this case provision was made for maintenance of a wife proved guilty of adultery without the insertion of a *dum sola et casta* clause in the order on the ground that the amount allowed was but a bare allowance for the wife's support and not a large sum.

JOTTINGS AND CUTTINGS.* [* 295]

Advice to Judges.—We draw the attention of the Subordinate Courts in this country to the observations of the Privy Council in the case of *Kali Kishore Dutta Gupta Mozoomdar* v. *Bhusan Chunder*[2]. *Sir Barnes Peacock*, delivering the judgment of the Judicial Committee said: "The Subordinate Judge did not even confine himself to the case before him but went out of his way to declare his suspicions and throw out insinuations with-

1. 24 Q. B. D. 361.
2. 17 I. A. 159.

out the slightest evidence to warrant them." In another part of the same judgment his Lordship observes: "Hasty, uncalled for and indiscreet expressions like these, casting suspicions of grave crimes against unnamed absent persons without one tittle of evidence to support them, are wholly unwarrantable, and cannot but destroy respect for the judgment and discretion of the Judge and lower the confidence which might otherwise attach to his decision upon the questions really before him." Judges have special reason to be on their guard against the use of indiscreet language affecting the character of persons, who have not the opportunity of defending themselves.

The Indian Law Reports.—In the course of his judgment in *Hafez Mahomed Ali Khan* v. *Domodar Pramanick*,[1] *Trevelyan* J. [* 296] says: "*As is frequently the case in the Law Reports, the absence of a report of the argument and of the cases cited inconveniences us in the consideration of the decision, but we must take the decision as we find it." Cannot our reports be improved?

How Leaders should behave towards Juniors.—Mr. Montagu Williams in his book called "the Leaves of a Life" gives a good illustration of this. Speaking of Serjeant Shee, Mr. Williams says that soon after he (Mr. Williams) was called to the bar he was once retained as the Serjeant's junior. He had known Shee but slightly, but as he went into the consulting room, the old Serjeant patted him on the shoulder and said, looking at a bundle of papers under the arm of Williams: "Lots of briefs flowing in, my boy; delighted to see it." When the consultation began, the Serjeant turning to the solicitor who instructed them said: "Winning case, pleadings all wrong. That young dog over there (pointing to Williams) smelt it out long ago as a terrier would a rat, I can see, eh, Montagu Williams? You have found it out, I can see it by your face." Upon this Williams remarks: "Heaven knows I was as innocent of finding any thing out as the man in the moon. I sniggered feebly; and then the Sergjeant proceeded to put in my mouth the vital blots in the case of our adversary which he alone had discovered. That was the way leaders treated their juniors." Can we say the same in this country?

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1. I. L. R. 18 C. 264.

Etiquette.—Counsel naming his own Junior :—Says Mr. Montagu Williams at page 169 of his book: "It is *contrary to etiquette* at the bar for counsel *to name their own juniors.*" The reason of this rule is not far to seek.

Counsels' fees and the Eighth Annual Statement of the Bar Committee in England.—The Committee having had a correspondence with the Incorporated Law Society extending over some years on the subject of counsels' fees, they drew up a report on the subject for the use of the bar. The Committee expressed the opinion, *inter alia*, that by a long-settled practice, the fees on the briefs of leader and junior respectively stand to one another in the proportion of three to two, or five to three, and that such a practice is reasonable and works satisfactorily. There is, however, no rigid rule on the subject. A junior is entitled to refuse a brief which is not marked in this proportion, but he is not bound to do so, and he may accept a brief marked in smaller proportion without any breach of professional etquette and a leader may, without any breach of professional etiquette, accept a brief, the fee on which does not exceed that on the brief of his junior in this proportion.

Upon the question as to what special fees are recognized by the practice of the profession and are not taken as part of the brief fee, the usage of the bar appears to be as follows. A barrister is considered to be prepared to take any brief in the Courts in which he professes to practice, at a proper professional fee, according to the length and difficulty of the case. Any counsel is at liberty to say that he will not practise in a particular *Court without a special fee of a named amount, or that he will not go into Court at all without a special fee of a named [* 297]
amount; but such special fees, when asked, should, according to the practice as hitherto understood at the Chancery bar, be asked in all cases, or in all Courts, except the one or more in which the barrister usually practises. At the Common Law bar the practice has been governed rather by the rules of the various circuits, and the special fees to be taken by members of circuits accepting briefs on other circuits have been fixed by the rules of the circuits, and not by the individual members of the bar. It appears to have been generally understood on all circuits that no one should take a special fee, properly so-called on his own circuit. There appears, however, to be no objection in principle to a counsel

having a special fee for going out of town to a circuit of which he is a member, or to particular towns on that circuit, provided that the special fee is taken in all such cases. In no case ought a fee, which is really a brief fee given for getting up a case in order to conduct it in Court and for conducting it there, to be divided and marked in part as a special fee merely for the purpose of paying a less fee to other counsel engaged in the case.—*The Law Journal.*

Marriage Law:—It now appears to be absolutely necessary to reconsider our whole law of marriage and the relationship of the sexes. The law of breach of promise, by which a man must perform his promise at the risk of his life; the law of the nubile age by which marriage between a boy of a fourteen and a girl of twelve is valid, and the consent of parents or guardians, though nominally required, may be easily misrepresented to exist—a point which we hope to see dealt with by the Bishop of London's Bill to Amend the Marriage Act of 1823; the law of liablity of a husband for his wife's debts and torts; the law by which a married woman alone of all debtors is exempt from imprisonment, when she can pay her debts but will not; and, lastly, the law of divorce, by which a woman may leave her husband for any reason, good or bad, the day after marriage, with no remedy but a judcial separation—all these and many more points in our law of marriage require immediate and careful consideration and revision:—*Ibid.*

Legislation for the Prevention of Blindness:—Many thinkers like Mr. Herbert Spencer and Mr. Auberon Herbert (the spoiled child of politics, as we think, the *Saturday Review* once called him) are disposed to believe that we attempt far too much by legislation, and no doubt the billmongers in Parliament do aim at very minute interference with men's affairs. But we are far behind our American cousins. Bailie Nicol Jarvie, in Scott's novel, thought that suicide ought to be put down. The New York Legislature, it appears, is of opinion that blindness ought to be put down, for it has recently passed an Act for the prevention of that affliction. The Act declares that 'should any midwife or nurse, having charge of any infant in this state, notice that one or both eyes of such infant are inflamed or reddened at any time within two weeks

after its birth, it shall be the duty of such midwife or nurse having charge of such infant to report the fact in writing, within six hours, to the *Health Officer or some legally qualified practitioner [* 298] of medicine of the city, town or district in which the parents of the infant reside.' Health officers and doctors in the State of New York will certainly have no sinecure as it is tolerably certain that, either from crying or some cause not necessarily connected with the eye sight, every child's eyes will be more or less 'inflamed or reddened' at some period within two weeks of its birth ; and we should imagine that redness and inflammation are by no means the only symptoms of approaching blindness. And if the symptoms of blindness are to be so noted, why not those of every human infirmity—deafness, and dumbness, and even every form of intellectual weakness ? It will be interesting to discover whether any good will arise from this specimen of legislative wisdom.—*The Law Journal.*

Retirement of Mr. Justice Stephen.—In the Court of the Lord Chief Justice, before Lord Coleridge (Lord Chief Justice of England), Lord Justice Bowen, Lord Justice Lindley, Mr. Baron Pollock, Mr. Justice Hawkins, Mr. Justice Cave, Mr. Justice Vaughan Williams, Mr. Justice Grantham, Mr. Justice Lawrance, Mr. Wright, and Mr. Justice Jeune, on April 7, it having been announced that Mr. Justice Stephen would take his leave of the bar on his retirement from the bench, the Court was crowded in every part with members of the bar, comprising all the leaders, among them Sir R. Webster (the Attorney-General), Sir E. Clarke, (the Solicitor-General), Sir Henry James, and a host of others. At eleven o'clock the above-mentioned judges, headed by Lord Coleridge who was accompanied by Mr. Justice Stephen (who, having already retired, appeared without his robes), came into Court and took their seats on the Bench, the Lord Chief Justice putting into his own seat the retired judge and seating himself by his side, Lord Justice Bowen sitting on the other side, and the other judges grouped around them standing.

The Attorney-General then rose, the whole bar rising with him and standing while he spoke, and addressed their Lordships in these words: My Lord Mr. Justice Stephen.—It was with great regret we saw the announcement that you would to-day

take your leave of the bar, with which you have been so long connected, and it falls to my lot, on behalf of the profession, to offer to you the expression of our regret in bidding farewell to you as a judge. In doing so it may not be inopportune to recall one or two incidents of your long and distinguished career. Coming from the University (Cambridge) and the College (Trinity Hall) which claim so many of our distinguished judges, you joined the circuit (the Midland) to which have belonged in our time so mav members of the bench—Lord Field, Mr. Justice Mellor, Mr. Justice Hayes—to say nothing of those who are now on the Bench, and some of whom now attend to take part in this farewell. It is unnecessary for me to remind so many who remember it of your career at the bar on that circuit. But one incident in your career is, so far as my knowledge goes, without precedent, and deserves a passing notice. It is not in this
[* 299] *country alone that you have rendered distinguished public service. For four years you served as Legal Member of the Council of India, and, following the example of your great predecessor Macaulay, you rendered valuable service in codifying and improving the law of our great Indian Empire. When, after your period of office had expired, you returned to active work at the bar, your brethren found that they had still in you, an able rival and antagonist, one whose experience and knowledge had been only ripened by change of scene and change of work. And when, in 1879, it pleased Her Majesty to select you for the judicial office you have since filled, I need not say how universal was the feeling of approval and congratulation which hailed your appointment. And since then, for more than twelve years, you have fulfilled the duties of that office from which you now retire. I need not remind your brethren of the Bench, nor the members of the profession, nor the public whom you have served, of the value to the Bench of your profound knowledge of, and vast experience in, the criminal law, your practical experience in its administration, and your knowledge of matters of business and keen insight into legal principles. We learn with regret that failing health has induced you to determine to retire from judicial work. We deeply regret the cause, but we honour and esteem the man who, as soon as he became aware that any question might be raised, as to his absolute or unimpaired capacity to fulfil his duties, determined that he would no longer retain

his post, nor allow such a question to be raised, however he might think himself able to discharge the duties of the office. We cannot follow you into your retirement, but we are sure that you cannot long be in want of an avocation or a pursuit. Your fertile mind, we are well assured, will again enrich the storehouse of literary wealth to which you have already made so many valuable contributions. We wish you many years of restored health to enjoy your well-earned repose, and you will be able to realise from this crowded assemblage the feelings by which you are accompanied in your retirement—feelings to which I have given some feeble expression—and you must be well assured that you carry with you into your retirement our regard, our respect, and our esteem.

The learned judge, at the conclusion of this address, remained some moments silent, evidently unable to find immediate utterance for the feelings by which he was oppressed. After some moments, the Lord Chief Justice and Lord Justice Bowen rising and remaining standing, with the other judges and the bar, while he spoke, the learned judge, in a low tone of voice, marked by deep and suppressed emotion, spoke as follows: My Lords, Mr. Attorney-General, gentlemen of the bar: I have come here for the purpose of wishing you 'Good-bye,' and I just wish to say a few words as to the causes which led to my retirement. I myself had very little expected to have to take such a step; indeed, it never entered into my mind, except so far as every man must look forward to the ultimate conclusion of his career. However, not very long ago I was made acquainted, suddenly, and to my great surprise, that I was regarded by some as no longer physically capable* of discharging my duties. I made [*300] every inquiry to ascertain what grounds there were for this impression, and I certainly rejoice to say that no single instance was brought to my notice in which any alleged failure of justice could be ascribed to any defect of mine. I consulted physicians of the highest eminence, and they told me that they could detect no sign whatever of decay in my faculties and that, therefore, it was not a matter of immediate necessity in the public interest that I should retire. But they told me at the same time that they thought it would be well, for my own sake, that I should do so, and that opinion they grounded upon the state of my

health. I communicated their decision to the Lord Chancellor, and with his sanction I determined to retire, as I now do. I should have thought it unbecoming of any person in my position to strive to hold on to his office to the last possible moment, even although at the time I had no doubt as to my capability for discharging my duties. I could not have done so under any circumstances; and accordingly I avoided all occasion for any further discussion on the subject after I received the intimation which I have mentioned. I wish to add this remark as to my own feelings on the subject. So far as I am conscious of my own condition of mind and body, I do not think that retirement would be necessary; but I have thought it right and becoming to take that step *out of respect for the office which I have held* and *because I feel it to be important not only that its duties should be well discharged, but that there should be no question as to their being so discharged.* These are the grounds upon which I have thought it right, with regard to my own reputation and the public good, that I should cease to hold the office which I have held for more than twelve years. I have more to say, and what more I have to say it is by no means easy for me to say in the presence of so many whose faces are so familiar to me, and so many of whom are so dear to me, and have long been so. I have always felt—though I never was yet in a position to feel it with so much keenness as I do now feel it—that there is a fellowship which pervades every branch of the profession to which we all belong, and especially those who have the honour to sit on the judicial bench. During the years which I have sat here, I have found myself a member of a society which, I think, hardly can be equalled elsewhere. I have been, and hope I shall be for the rest of my life, the intimate friend of many around me. I have been, I believe, perfectly friendly with all. I do not think there is a single member of the profession towards whom I have other than friendly feelings. Enmities are doubtful things; one hardly knows, perhaps, always who is absolutely one's friend or one's enemy. But I am not conscious of having any unkind feeling against any member of the profession, and I have no impressions of relations not perfectly satisfactory with the very large number of persons with whom at one time or another I have been brought in contact. Of course, in the office I have held

it is not possible but that mistakes should occur, and under the present system opportunities for bringing forward everything in the nature of complaints against any person in such a position *are easily used, and have, I believe, been used against me. But, [*301] whatever may have been the result, and in whatever instances I may have been appealed against, and my judgments reversed, or in whatever other way what I have said or done has been called in question, I can affirm with absolute certainty that nothing has been done in relation to me of which I have had any unkind recollection. As I have already said—and I say it again—I believe the *mutual understanding between the bench and the bar is one of the great advantages of the present constitution of English society, and long may it continue so ; long may it be true that, while the bar supply the keenest and most impartial criticism of the bench, the bench can rely with the greatest confidence upon the kindness, the respect and the support—the moral support—of the bar who practise before them.* I do not remember in the course of the twelve years during which I have sat on the bench—I do not remember any dissension between me and any members of the bar which has left on my mind any sense of bitterness. I do not remember ever to have been treated with disrespect in the exercise of my judicial functions; certainly nothing has occurred at variance with that feeling of fellowship and good will which, as I have said, pervades the profession, and of which what the Attorney-General has said has been an expression. I do not desire to make a tragedy of this occasion, nor to dwell on those feelings with which I leave the seat on the bench by which my ambition has been fully gratified. My feelings towards my friends in the profession have been very strong, and I am now conscious of having sustained a part which I shall look back to with feelings of gratitude, in whatever may be left to me of life. I have now said what came into my mind to say on this occasion, and I will only add these words, with more feeling than, perhaps, may be supposed—'God bless you all, every one of you !'

These words the learned judge uttered with evident emotion and sat for some moments silent, quite subdued by his feelings. He then rose slowly, shook hands warmly with Lord Coleridge and Lord Justice Bowen on each side of him, and then went out of Court, shaking hands with such of the judges as he passed and so retired.—*The Law Journal.*

[* 363] *III. ENGLISH LAW REPORTS FOR 1890.

In the case of *Berridge* v. *Berridge*,[1] the right of co-sureties to the benefit of a counter-security obtained by one of them from the principal debtor, is discussed. In the well-known case of *Dering* v. *Winchelsea*[2], the principle was laid down and acted upon that as between co-sureties there is to be equality of burden and of benefit. The principle of equality as explained in a later case is that all should contribute equally if each is a surety to an equal amount, and if not equally, then proportionatey to the amount for which each is a surety. This principle of equality of burden is embodied in Ss. 146 and 147 of the Indian Contract Act, but the Act is so carelessly drawn up that it does not say anything about the equality of benefit. We learn what that means by turing to the case of *Steel* v. *Dixon*[3] Lord Justice *Fry*, then Mr. Justice *Fry*, explains the principle in these words: 'Each surety must bring into hotchpot every 'benefit which he has received in respect of the suretyship 'which he undertook, and if he has received a benefit by way of 'indemnity from the principal debtor, it appears to me that he 'is bound as between himself and his co-sureties to bring that 'into hotchpot in order that it may be ascertained what is the 'ultimate burden which the co-sureties have to bear, so that that 'ultimate burden may be distributed between them equally or 'proportionately as the case may require.'

In the later case of *Berridge* v. *Berridge*,[4] Mr. Justice *North*, following the above-mentioned principle to its logical consequence, held that, when by means of the counter-security the surety has been repaid what he has paid on account of the principal debt and has shared the amount thus received by him with his co-sureties, he will be again entitled to recover out of the counter-security the amount so handed over by him to them, whereupon their right to participate will again accrue, and so on, until the whole of the payments made by the co-sureties on account of the principal debt have been refunded or the value of the counter-security has been exhausted. [According to some of the Indian cases this right to contribution can only be enforced when the surety has paid actually more than his quota and cannot be

1. (1890) 44 Ch. D. 168.
2. (1787) 1 W. and T. L. C. 114.
3. (1881) 17 Ch. D. 825.
4. (1902) I.L.R. 26 M. 322.

enforced where the surety has not paid any amount but has only given a pronote. See *Putta Narayanamurthi Aiyyar* v. *Marimuthu*[1] where Mr. Justice *Bhashyam Iyengar* refers to the English and American Law. See also *Pundi Doraisami Tevar* v. *Lakshmanan Chetty*[1] Cf. *Chandra Sekhar* v. *Nafa Chandra*[2]:—ED.]

The case of *Gordon* v. *Silber*[3] raises an interesting question of law as to the lien of an inn-keeper on the separate property of a wife who was putting up in the inn with her husband. The facts of the case were briefly these. The plaintiffs were proprietors of a hotel. The male defendant came and stayed by himself at the hotel for some time and incurred expenses which he paid. He was then joined by his wife. She left him for a fortnight and again joined him. The husband met her at the station and they came to the hotel with a large quantity of luggage and occupied the same rooms which they had previously occupied. The husband left the hotel first, and then the wife. A portion of the bill remained unpaid. The plaintiffs detained the luggage which happened to be the separate property of the wife and claimed a lien over the same for the balance due to them; and they further claimed that the wife also was liable for the amount. They admitted that the husband was the contracting party to whom credit had been given. Lord Justice *Lopes*, trying the case without a jury, held that plaintiffs being inn-keepers were bound to receive the defendants and their goods, and were bound so long as the defendants remained as guests at the hotel, to keep safely and securely their goods. Plaintiffs did not know of any distinction between the goods of the husband and wife, and could not enquire into their respective titles to the goods. They received the goods as the goods of the husband and his wife who became their guests. If the husband had brought goods to the hotel to which he had no title, the inn-keeper would all the same have had his lien on the goods because he was obliged to receive the guest without enquiry as to his title. It did not make any difference because the goods happened to be the separate property of the wife; otherwise it would be in many cases defeating the inn-keeper's lien and the object for

1. (1903) 14 M.L.J. R. 285. 2. (1906) 4 C.L.J. 555.
3. (1890) 25 Q. B. D. 491.

which it was given. He therefore upheld the lien while disallowing plaintiffs' claim to make the wife personally liable [* 365] for the balance. As the learned Judge* observes in the beginning of his judgment, the point is one which could not have arisen before the passing of the Married Women's Property Act, 1882. The effect of that Act is that from 1st January 1883 every woman who marries on or after that date is to hold as her separate estate all her property either then already belonging or afterwards coming to her in any manner, and whether such property be real or personal, including wages, earnings and gains earned or made by her in any occupation which she carries on separately from her husband, and any woman already married before the 1st day of January 1883 is to hold as her separate estate all property, the title to which (of whatever character that title may be) shall come to her after that date. Every married woman is also capable of entering into any contract in respect of her separate property, and of suing and being sued either in contract or in tort in all respects as if she were a *feme sole.* She has also the same civil remedies and the same remedies and redress by way of criminal proceedings against all persons for the protection and security of her own separate property, as if she were a *feme sole*; subject to the proviso that she cannot take criminal proceedings against her husband concerning such property, unless the same shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert his wife. The husband shall be liable for his wife's ante-nuptial debts and liabilities only to the extent of the property belonging to his wife, which he shall have acquired or become entitled to, from or through his wife, after deducting sums paid by him on her behalf in regard to which judgment has been *bona fide* recovered against him. A wife who does anything with respect to her husband's property shall be liable to criminal proceedings by her husband in all those cases when if the husband had done a similar act with respect to the wife's property he would be liable to criminal proceedings by the wife under the Act. We have now to see whether the decision is right, considering the provisions of the said Act. We hesitate to say that it is. No doubt under the old law the husband and wife became by their marriage, for some purposes a single person in the eye of the law, and it was the principle of

the common law that a man could not in general grant anything to his wife or enter into any covenant with her and no action could be brought by one against the other, nor could they at one time be received as witnesses for or against each other.

*These disabilities have now for the most part ceased to exist and with them the fiction[1] that they are one in the eye of law disappears. The plaintiffs in the case admitted that the husband was the contracting party and that it was to him alone that credit had been given. How can the plaintiffs then claim a lien on goods belonging to the wife except on the ground of estoppel—that is, that the wife by her act or omission intentionally caused or permitted plaintiffs to believe and to act on the belief that the goods were the goods of the husband. The learned Judge says that plaintiffs received the goods as the goods of the husband and wife and that they did not know of any distinction between the goods of the husband and wife and could not enquire into their respective titles, and that plaintiffs were bound to receive the defendant and their goods. All these would be strong grounds for holding that the wife also should be liable to the plaintiffs to the extent of her separate property, but the plaintiffs' suit to make her liable was discussed on the ground that plaintiffs had not looked to her for payment when they received the husband and wife as their guests. Having exempted her from liability, we do not see how the learned judge could hold that her property was subject to the plaintiffs' lien except on the ground of estoppel, which was never put forward, and as far as one can see, could not have been put forward on the facts found. The matter would have been different if the plaintiffs had received the goods as the goods of the husband, as it would be in the analogous case put forward of a person bringing goods, to the hotel, to which he had no title. In the case put forward, supposing the rightful owner also had accompanied the other and put up in the hotel, and the hotel-keeper had not looked to him for payment, would his goods have been considered subject to the lien simply because the two friends came together, except on the ground of estoppel? For these reasons we hesitate to accept the decision as sound. [*366]

1 As in other cases, (and in this respect English law affords, the worst possible illustrations) fictions do not disappear. They stick in form and in name notwithstanding the substance may have changed. The fiction that husband and wife are one is still resorted to although the wife is declared liable to be sued.—Ed.

When a tenant enters into a contract with his landlord that he would, during the term of the tenancy, keep the premises in good tenantable repair and so leave the same at the expiration thereof, what is the meaning of the words 'good tenantable repair'? The question is discussed and the points to be considered laid down with great lucidity in the case of *Proudfoot* v. *Hart*[1].

[* 367] *The definition of the words 'good tenantable repair' given by Lord Justice *Lopes* and accepted by the Master of the Rolls is this: Good tenantable repair is such repair as having regard to the age, character, and locality of the house would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it. The definition given by *Alderson*, B. in the earlier case of *Belcher v. Mackintosh* [2] is:—Such a state as to repair that the premises might be used and dwelt in not only with safety but with reasonable comfort by the class of persons by whom and for the sort of purposes for which they were to be occupied. A tenant who enters into such a conract is bound if he finds the premises out of repair when he takes them to put them into good tenantable repair.—*Payne* v. *Hain*.[3] The nature of the repair would not be the same in all cases. As the Master of the Rolls puts it, nobody could reasonably expect that a house 200 years old should be in the same condition of repair as a house lately built, nor would the repairs necessary for a palace be the same as those necessary for a cottage, nor would the repairs for a house in Grosvenor Square be the same as those for one in Spitalfields. The undertaking does not mean that the house should be in the same condition in which the tenant took it, or that it should be put into perfect repair, but only such a state of repair as would render it reasonably fit for the occupation of a tenant of the class who would be likely to take it. For instance in regard to papering, painting and other decorations, the tenant is not, generally speaking, bound to re-paper or re-paint or re-decorate, still less re-paper or re-paint with paper or paint similar to that which was on the walls. But if the paint through lapse of time has worn off or the paper has become worn out so that their condition has become such as not to satisfy a reasonably-minded tenant of the class that would be

1. (1890) 25 Q. B. D. 42. 2. (1839) 2 M. & Rob. 186. P.C. 8 Car. and p. 720,
3. (1847) 16 M. & W, 541.

likely to take the house, then he must re-paper and re-paint so as to make the premises reasonably fit for the occupation of such a tenant.

* * * *

The question of the validity of a marriage between a British subject temporarily resident in a foreign country and a native lady belonging to that country according to the forms required by the law of the country was considered in the case of *Brinkley* v. * *Attorney-General.*[1] The general principle regulating such cases was laid down by Lord *Brougham* in *Warrender* v. *Warrender*[2] in these words:—'A marriage good by the laws of one 'country is held good in all others where the question of its vali- 'dity may arise. For the question always must be: Did the parties 'intend to contract marriage? And if they did that, which in the 'place they were in is deemed a marriage, they cannot reasonably or 'sensibly or safely be considered otherwise than as intending a mar- 'riage contract.' But his Lordship also laid down a qualification of the principle in these words:—'The rule extends, I apprehend, 'no further than to the ascertaining of the validity of the contract 'and the meaning of the parties, that is, the existence of the con- 'tract and its construction. If indeed there go two things under 'one and the same name in different countries—if that which is 'called marriage is of a different nature in each—there may be 'some room for holding, that we are to consider the thing to 'which the parties have bound themselves, according to its legal 'acceptance in the country where the obligation was contracted. 'But marriage is one and the same thing substantially all the 'Christian world over. Our whole law of marriage assumes this; 'and it is important to observe that we regard it as a wholly 'different thing, a different status from Turkish or other mar- 'riages among infidel nations, because we clearly never should 'recognize the plurality of wives and consequent validity of se- 'cond marriages, standing the first, which second marriages the 'laws of those countries authorize and validate * * 'Indeed if we are to regard the nature of the contract in this 'respect as defined by the *lex loci*, it is difficult to see why we may 'not import from Turkey into England a marriage of such a 'nature as that it is capable of being followed by and subsisting [* 368]

1. (1890) 15. P. D. 76 2. (1835) 2 Cl. & F. 488.

'with another, polygamy being then of the essence of the
'contract.' The incidents, attaching to a marriage as under-
stood in Christendom were explained more fully by *Lord
Penzance* in *Hyde* v. *Hyde and Woodman.*[1] It was a suit by an
Englishman for dissolution of marriage on the ground of
adultery. The marriage had been celebrated in the Mormon
form in the United States where such a form of mar-
riage was recognized as valid, if the parties were both
unmarried at the time when it was contracted and were both
[* 369] *capable of contracting marriage. These conditions had been ful-
filled in the present case. Polygamy and divorce were permitted
among Mormons. The learned judge refused to recognize the
marriage as valid according to the law of England. He defined
marriage as understood in Christendom to be the voluntary union
for life of one man and one woman to the exclusion of all others
and explained the incidents attaching to such a marriage in these
terms. 'Conjugal treatment may be enforced by a decree for
'restitution of conjugal rights. Adultery by either party gives a
'right to the other of judicial separation; that of the wife gives a
'right to a divorce; and that of the husband, if coupled with
'bigamy, is followed by the same penalty. Personal violence,
'open concubinage, or debauchery in face of the wife, her degrada-
'tion in her home from social equality with the husband and her
'displacement as the head of his house-hold, are with us matri-
'monial offences, for they violate the vows of wedlock. A wife
'thus injured may claim a judicial separation and a permanent
'support from the husband under the name of alimony at the rate
'of about one third of his income. If these and the like provisions
'and remedies were applied to polygamous unions, the Court
'would be creating conjugal duties, not enforcing them, and fur-
'nishing remedies when there was no offence. For it would be
'quite unjust and almost absurd to visit a man who, among a
'polygamous community, had married two women, with divorce
'from the first woman, on the ground that in our view of marriage,
'his conduct amounted to adultery coupled with bigamy. Nor
'would it be much more just or wise to attempt to enforce upon
'him that he should treat those with whom he had contracted
'marriages, in the polygamous sense of that term, with the con-
'sideration and according to the status which Christian marriage

1. (1866) 1 P. & D. 130.

confers.' Mr. Justice *Sterling* followed this decision in *In re Bethell*: *Bethell* v. *Hildyard*,[1] and refused to recognize as valid a marriage between an Englishman and a woman belonging to the Baralong tribe in South Africa (among whom polygamy was allowed), performed according to the customs of the tribe. The case of *Brinkley* v. *Attorney-General*[2] is the converse of these two cases. In this case a marriage between a British subject temporarily resident in Japan and a Japanese lady according to the forms required by the law of Japan was recognized as a valid marriage according to the law of England on its being shown that* the husband was precluded from marrying any other woman [* 370] during the subsistence of the marriage. The Court observed that Japan had long taken its place among civilized nations whose forms and laws and ceremonies were not to be treated as on the same footing with those of the Baralong tribe of South Africa. It is a pity that one cannot yet say that India has taken its place among civilized nations in regard to marriage so far as Hindus and Mahomedans are concerned.

* * * * * *

COMPROMISE BY PLEADERS.

The recent case of *Jang Bahadur Singh* v. *Shankar Rai*[3] decided by a Full Bench of the Allahabad High Court suggests the question as to the extent of a vakil's authority to bind his client by a compromise entered into without express authority. Chief Justice *Edge* laid down the rule with the concurrence of his colleagues, that unless the authority to act for his client is revoked and such revocation is notified to the opposite side, counsel has, by virtue of his retainer and without further authority, full power to compromise a case on behalf of his client, and that unless the compromise was entered into under a mistake, and some palpable injustice was caused to the client, the Court would not set it aside. Speaking of certain Allahabad cases relating to the authority of vakils, his lordship pointed out that they did not affect the case before him. He added : "When the authority of vakils to bind their clients is called in question, that authority must depend entirely on the terms of the particular

1. (1888) 38 Ch. D. 220.
2. (1890) 15 P. D. 76.
3. (1890) I. L. R. 13 A. 272.

vakalatnama. For my part I should read a vakalatnama widely and liberally unless it appears that the client intended to limit the authority of his vakil." We shall now proceed to consider the question thus left undetermined by his Lordship.

S. 39 of the Code of Civil Procedure requires an appointment of a pleader to be in writing and to be filed in Court before he can represent his client. There is nothing in the Legal Practitioners' Act or the Letters Patent of the High Courts which defines the limits of a vakil's power to act for his client. We have to gather the extent of his authority from the nature of his situation, as in a sense the agent of his client, and the character of the business

[* 371] ness which requires *a large measure of freedom and discretion. In England there have been two classes of persons representing the litigant in Court, the attorney and the barrister. The barrister has occupied an exceptional footing. He enters into no contract with the client, he is not entitled to sue for his fees, he is not liable for negligence or want of skill in the conduct of the cause. It has on the other hand always been an accepted rule in England that a counsel has authority to bind his client by a compromise or by withdrawing a juror or confessing judgment. See *Furnival* v. *Bogle* [1].

In *In Re Hobler*[2] a petition was dismissed by consent. On a motion to set aside the dismissal on the ground that counsel had no authority to consent, the Court held that the order could not be set aside. See also *Hargrave* v. *Hargrave*[3]. The course of decisions seems to have been uniform until the great case of *Swinfen* v. *Swinfen*[4], when Sir *John Romilly*, the Master of the Rolls, refused specific performance on a bill in chancery, of the provisions of a compromise entered into by *Tesiger*, counsel, on behalf of his client, Mrs. Swinfen, but against her authority. This decision was affirmed by Lords Justices *Knight Bruce* and *Turner* in appeal[5] on the ground that specific performance would not be decreed under the circumstances of the case. Sir *John Romilly* dissented from the Judges of the Common Bench who passed a decree[6] according to the compromise holding it to be valid. He maintained that, however large the authority of counsel, it would not extend to the effecting of a compromise

1. (1827) 4 Russ. 142.
2. (1844) 8 Beav. 101.
3. (1850) 12 Beav. 408.
4. (1857) 24 Beav. 549.
5. (1858) 2 De Gex. & J., 381.
6. (1857) 1 C. B. N. S. 364.

against the wishes of the client. But this decision of Sir *John Romilly* which depended very much on the peculiar circumstances of the case, has been treated as not affecting the principle as to the extent of counsel's authority. Although the compromise was thus defeated, an action brought by Mrs. Swinfen, against her counsel, *Swinfen* v. *Lord Chelmsford*[1] was thrown out on the ground that he had acted *bona fide* and that he could not therefore be liable.

In *Chambers* v. *Mason*[2] the action was compromised by counsel. There was a conference about the terms offered by the plaintiff at which counsel said last "he would do his best." The compromise which was the subject of the conference between the defendant and his counsel was subsequently entered* into by the [* 372] latter. *Willes* and *Byles*, JJ., held on the authority of *Swinfen* v. *Swinfen*[3] that the rule for a new trial should be discharged, because the authority of counsel to make this compromise ought not to be enquired into. *Crowder*, J., the dissentient Judge in *Swinfen* v. *Swinfen*[4] held merely that the client must be taken to have consented to the compromise. And in *Thomas* v. *Harris*[5] on a motion to set aside a compromise by counsel and for a new trial on the ground that counsel had no authority, *Pollock* C. B., and *Bramwell*, B., said: "Counsel has authority to do so in the absence of the client. *Swinfen* v. *Swinfen*[3] does not affect the ordinary authority of counsel. That was a case of something beyond the ordinary scope of their authority and, as was alleged, against an express direction of the client." The qualification laid down in *Swinfen* v. *Swinfen*[3] has been rejected in more recent cases.

In *Strauss* v. *Francis*[6] which was an action for libel, Sergeant *Ballantine*, who was counsel for the plaintiff, withdrew a juror. On a motion to continue the action, *Blackburn*, *Mellor* and *Shee*, JJ., held that counsel had authority unless the withdrawal of his brief was communicated to the opposite side. *Shee*, J., however added: "Although a counsel has this general authority it is yet not an authority which cannot be limited."

1. (1860) 5 H. & N., 890.
2. (1858) 5 C. B. N. S., 59.
3. (1857) 24 Beav. 519 affd. in (1858) 2 De Gex & J., 381.
4. (1857) 1 C. B. N. S. 364.
5. (1858) 27 L. J. Ex. 353.
6. (1866) 1 Q. B. C. 379.

Since the Judicature Acts the same principle has been laid down in both the Chancery and Queen's Bench Divisions. When counsel had made no mistake as to the facts, *Malins*, *V. C.*, held that an order for a decree according to compromise, could not be discharged.—*Holt* v. *Jesse*[1]. Nor could the client withdraw the consent which counsel had given to an order—*Harvey* v. *Croydon Union Rural Sanitary Authority*[2]. The Court (Lord *Coleridge*, C.J., and *Cotton*, L.J.) held that the master must perfect the order, without prejudice to any motion that the defendant might make to be relieved of the consent, on the ground of mistake or surprise or for other sufficient reason. Counsel could also give a valid consent not to appeal. *In re West Devon Great Consols Mine*[3] we must consider the authority of *Swinfen* v. *Swinfen*[4] overruled, if not limited to the peculiar facts of that case. In the Queen's Bench Division the same decision has been arrived at. In *Matthews* v. *Munster*[5] the leading case on that side of the Court, Lord *Esher*, M. R., *Bowen* and *Fry* L. JJ.,
[* 373] *held in an action for malicious prosecution, that a compromise whereby the defendant's counsel consented to a decree for damages and to withdraw the imputation on plaintiffs, was valid, though the client and attorney who were absent, telegraphed to him to defer it until they arrived, and he did not. It is clear from these cases that counsel can bind his client by a compromise, even though it is against the client's wishes, if they have not been communicated to the opposite party, and that no action will lie against him for what he has done in respect of the cause *bona fide*.

The power of a pleader to bind his client is more analogous to that of an attorney. The vakalatnama of the vakil corresponds to the warrant of attorney filed in Court by the attorney. See the note to *Swinfen* v. *Swinfen*.[4] Their liability for unskilful conduct is the same. In *Prem Sookh* v. *Prithee Ram*[6], *Turner* and *Spankie* JJ. said: "a vakil has not ordinarily greater power to bind his client than that which is possessed by an attorney in England." Let us examine the extent of the attorney's power in England. We have here to consider the cases in two aspects; first how far the client is

1. (1876) 3 Ch. D. 177.
2. (1884) 26 Ch. D. 249.
3. (1888) 38 Ch. D. 51.
4. (1857) 24 Beav. 549.
5. (1887) 20 Q. B. D. 141.
6. (1867) 2 Agra 223.

bound by the action of the attorney, secondly, whether the attorney renders himself liable to his client. With regard to the first question the power of an attorney differs very little indeed if at all from that of counsel. In *Faviell* v. *Eastern Counties Ry. Co.*[1] which was a motion to shew cause why the defendant should not pay to the plaintiff the amount awarded by an arbitrator although the attorney had no specific authority to refer the matter to arbitration, the Court (*Pollock*, *C. B.*, *Alderson*, *Rolfe* and *Platt* B. B.), held that the attorney could refer under his general authority ; but *Platt*, B., added "if the attorney acted without authority and the client is injured he has a remedy." In *Fray* v. *Vowles*,[2] the Court pointed out the distinction forcibly. An action by the plaintiff in which the present defendant was his solicitor was compromised by him contrary to directions of the client. The plaintiff now sued the attorney for damages. It was pleaded that the compromise was reasonable, beneficial, *bona fide* and under directions of counsel. Lord *Campbell*, C. J., and *Erle*, *Crompton* and *Hill*, J J., held the plea bad. Lord *Campbell* said: "I think an attorney who has power to conduct a cause has power to enter into a compromise* provided he does it reasonably and [* 374]
skilfully and *boda fide* : and if there had been no express directions from the plaintiff to him not to enter into a compromise, I think here there would have been a good defence. But it being alleged that he had directions not to do so and that he did so in violation of such directions and while they were in full force, the compromise was *ultra vires* between him and his client *though it may be binding between the client and third parties.*" The language of the majority of the common law judges in *Swinfen* v. *Swinfen*,[3] who considered it twice was to the same effect. But as we have already noticed, the Master of the Rolls refused to decree specific performance of the compromise. But in spite of *Swinfen* v. *Swinfen*,[4] the authority of English cases since decided has even extended the limits of an attorney's power as laid down in *Fray* v. *Vowles*[2]. In *Chown* v. *Parrott*,[5] which was decided by *Erle* C. J., *Willes*, *Byles* and *Keating*, JJ., in 1863, the Court held that an attorney retained *to defend an action* was not guilty of actionable negligence, if he entered into a compromise without

1. (1848) 2 Ex. 344.
2. (1859) 28 L. J. Q. B. 232.
3. (1857) 1 C.B. N. S. 364.
4. (1857) 24 Beav 549.
5. (1863) 14. C. B. N. S. 74.

the consent of his client, provided he acted *bona fide* and with reasonable care and skill and the compromise was for the benefit of his client and was not made in defiance of his express prohibition. *Erle*, C. J., said: "The general authority to conduct a cause gives the attorney authority to compromise ; the reason why the compromise is held to be binding on the client is because the attorney is a general agent for the purpose." This case was followed in *Prestwich* v. *Poley*,[1] an action for the price of a piano, compromised without special authority by the plaintiff's attorney, by accepting the broken piano and costs. In *Butler* v. *Knight*,[2] *Kelly* C. B., *Channel* and *Pigott* B. B., carried the authority of the attorney to bind his client a little further. In that case after judgment was obtained for a sum of money the plaintiff impliedly continued the authority to the attorney to obtain satisfaction. The attorney entered satisfaction by accepting a lesser amount, in view to the threatened insolvency of the debtor. The compromise was made *bona fide* though against instructions. The Court held that though the attorney was liable to the client the plaintiff could no longer execute the decree against the judgment-debtor. This decision, however seems to be in conflict with the earlier case of *Connop* v. *Challis* [3] where it was held that a sheriff who released the debtor from arrest was liable to the decree-holder [* 375] *although the attorney who had acted without authority authorized the sheriff to discharge the debtor, after accepting a smaller sum than the decree-amount in satisfaction. But the case of *Butler* v. *Knight*[2] seems more in accordance with the later development of the extent of the attorney's authority. But the scope of his authority must be limited where he consents to a judgment fraudulently. In such a case the Court set aside the judgment (see *Williams* v. *Preston*[4]) a relief which the Courts are accustomed to grant, where fraud vitiates a judicial proceeding.

Turning from this state of the authorities in England to India, we find that although it has been held that the admission of a pleader on a matter of fact would bind his client (*Berkeley* v. *Musst Chittur Kuar*,[5] *Kower Narain Roy* v. *Sree nath Mitter*,[6].

1. (1865) 18 C. B. 806.
2. (1867) L R. 2 Ex. 109.
3. (1848) 2 Ex. 484.
4. (1882) L.R. 20 Ch. D. 672.
5. (1873) 5 N. W. P. 2.
6. (1868) 9 W. R. 485.

Kaleekanund v. *Gireebala*[1], *Khajah Abdool* v. *Gour Monee*[2], an almost uniform current of decisions has settled, both in Calcutta and Allahabad, that a pleader had no general authority to compromise the suit on behalf of his client and that the vakalatnama which authorizes him to conduct the suit or the defence confers no authority by implication to compromise. We are not aware of any decision going the length above indicated in Bombay or Madras. And the recent remarks of *Edge*, C. J., which we have already quoted, seem to indicate a liberal construction of the power conferred by a vakalat. *Prem Sookh* v. *Prithee Ram*[3] decided in 1867, by *Turner* and *Spankie* JJ., on the authority of *Swinfen* v. *Swinfen*,[4] lays down that "ordinarily a vakil employed to conduct a case on behalf of his client has no implied authority to compromise it." And the learned judges quoted with approval the words of the Master of the Rolls, that "if an attorney is employed to conduct a suit for a client a compromise does not in terms come within the scope of the authority, it is not within the management of the cause." We have already shewn that the decision of the Master of the Rolls related to a question of specific performance about which Courts of Equity are very particular, and his remarks were of no force beyond the peculiar circumstances of the case. We have seen, moreover, that the Common Law Judges dissented from his conclusion, and later decisions have not adopted the principles enunciated in that case. *Morgan*, C J., however followed this case in *Musst. Hakeemoonnissa* v. *Buldeo*,[5] where a pleader relinquished his defence* if the plaintiff swore that defendants were not the owners. [* 376]
In *Sheikh Abdul Sabhan Chowdhry* v. *Shibkisto Daw*,[6] *Bayley* and *Hobhouse* JJ., held that a vakil had not under his vakalat authority to give up a portion of his claim. The question was not necessary for decision, as their Lordships were of opinion that the lower Court, which accepted, on remand, the pleader's relinquishment of a portion of the disputed land, had no authority to consider it, the matter having been settled by the decision of the appellate tribunal that the plaintiff was entitled to all the disputed land. It was a case where the Sub-Court had no jurisdiction to determine whether the plaintiff was entitled to all the disputed land. On this ground the decision of the case was chiefly rested.

1. (1868) 10 W. R. 322.
2. (1868) 9 W. R. 375.
3. (1867) 2 Agra, 222.
4. (1857) 24 Beav. 549.
5. (1868) 3 Agra 309.
6. (1869) 3 B.L.R. App. 15.

The same learned Judges, however, reiterated their opinion in *Gour Pershad Doss* v. *Sook Deb Ram Deb*[1] that it was not within the ordinary scope of a pleader's duties to relinquish any portion of his client's case without express authority from the client, and that the client was not bound by such relinquishment unless authorized by himself. In the case of *Sheikh Abdul Sabhan Chowdhry* v. *Shibkisto Daw*[2] they distinguished an earlier decision of *Seton Karr* and *Macpherson* JJ. in *Ram Coomar Roy* v. *The Collector of Beerbhoom*,[3] as a case of withdrawal of the suit by the pleader with leave to file a fresh suit, although without express authority, and on the ground that the particular vakalat was more general in its terms. It does not, however, appear that the vakalat was different from the common form generally in use, and there does not appear to be any reason why if a withdrawal of the suit could bind the client, a compromise should not. The party must have lost the value of the stamp, and the other expenses incurred by him would be irrecoverable as against the defendant. There does not appear to be any distinction in principle between the two cases. However, the decision in *Gourpershad Doss* v. *Sook Deb Ram*[1] was followed in *Chunder Coomar Deo* v. *Mirza Sudakat Mahomed Khan*[4] by two other judges, *Kemp* and *Pontifex* JJ., where the pleader for the defendant gave up his claim if the *thak* map showed the land in dispute as part and parcel of plaintiff's taluqs, their Lordships holding that the pleader's statement was not binding on the defendant.

In Madras there is no direct authority on the question under consideration.[5] In *Avul Khadar* v. *Andhu Set*, [6] *Frere*
[*377] *and *Innes*, JJ. held that when in the lower appellate Court the defendant's vakil had consented to a decree in favour of the plaintiff, charging property in which the defendants had no interest, and decree was passed accordingly, the consent was beyond the scope of the suit and not binding on the party, and should not be acted on by the Court. This decision, although cited by the Allahabad Judges in *Prem Sookh* v. *Prithee Ram*[7] as supporting the conclusion they arrived at, was, we conceive, based upon other considerations. The Madras High Court

1. (1869) 12 W. R. 279.
2. (1869) 3 B. L. R. app. 15.
3. (1866) 5 W. R. 80.
4. (1872) 18 W. R. 436.
5. But see note at the end of this article :—ED.
6. (1865) 2 M. H. C. 423.
7. (1867) 2 Agra 222.

referred to *Swinfen* v. *Lord Chelmsford*[1] to shew that a pleader or counsel could not bind his client upon matters collateral to the suit, however wide his authority may be within the scope of the pending litigation. The decision of *Holloway* and *Innes*, JJ., in *B. Venkataramanna* v. *Chavela Atchiyamma*[2] went merely to this length, that a pleader could not alter the terms of a decree by a subsequent compromise as it was impossible for even the party to do so at the time, so as to affect the execution of the decree, without certifying adjustment to the Court, though *Holloway*, J. made the observation that there was great force in the argument of the appellant's vakil that the Court should have required a special vakalat authorizing the pleader below to consent to the strange agreement. Even supposing that this decision affirmed the principle laid down in *Connop* v. *Challis*[3] it is yet a long way from the decisions of the Allahabad and Calcutta Courts to which we have referred.

While we, therefore, consider that there is no authority in Madras negativing the pleader's authority to compromise without a special vakalat[4] we are also of opinion that the authority of the old decisions of Allahabad is weakened by the observations of *Edge* C.J., and by the fact that they were erroneously based upon the authority of *Swinfen* v. *Swinfen*[5] (which has ceased to be regarded as of general applicability) and the case of *Avul Khadar* v. *Andhu Set*[6] decided by *Frere* and *Innes*, JJ. The question of the extent of a solicitor's authority has been considered in Bombay by an eminent Judge, *Westropp*, C.J., in a case which came up before him on the Original Side—*Jagannathdas Gurubakshdas* v. *Ramdas Gurubakshdas*[7]. After discussing the English authorities, his Lordship held that a decree made in open Court upon the assent of counsel duly instructed, was binding as between the parties to the suit, although the defendant's *attorney [* 378] had no authority from his client to consent to such compromise or even though he was expressly directed not to compromise, provided such want of authority was not known to the opposite side.

1. (1860) 5 H. & N. 890.
2. (1871) 6 M.H.C. 127.
3. (1848) 2 Ex. 484.
4. But see note at the end of this article :—Ed.
5. (1857) 24 Beav. 549.
6. (1865) 2 M.H.C. 423.
7. (1870) 7 B. H. C. O.C.J. 79.

We consider this the true extent of a pleader's authority. It is open to doubt whether as Chief Justice *Edge* observes, it would be competent to the client to limit the attorney's power by special terms in the vakalat, so as to affect the opposite party, any more than it would be competent to a principal to limit the agent's authority so as to affect strangers dealing with him without notice of such limitation, who would be entitled to presume the extent of his authority from the nature and scope of the business. See *Whitehead* v. *Tuckett*[1] and EVANS on *Principal* and *Agent*, p. 175. This we understand to be the reason of the rule adopted by Chief Justice *Westropp*, that the attorney may make a binding compromise even against the directions of his client, although the decision itself is sufficiently explained by the principle that a general authority once granted cannot be limited so as to affect strangers without notice of such limitation.

Whether it is desirable that pleaders of all grades in this country should have the power is another question. It was probably an apprehension that the power was apt to be misused by a portion of the large body of inferior practitioners that induced the Calcutta and Allahabad judges to deny the power to pleaders in general to compromise on behalf of their clients. We think such an apprehension to be of less force now than twenty years ago when little or no qualifications were prescribed for pleaders. With the increase of their professional qualifications and status, the possession of that power is accompanied with less danger. And if a statute be enacted, limiting the power to compromise without special authority, to practitioners of the higher order, such as vakils and attorneys of the High Court and pleaders of the 1st grade, sufficient safeguard will have been provided against its abuse. Until, however, the statute law interferes to restrict it, we conceive that the power exists, whether we regard pleaders to occupy the position of counsel or attorneys in this respect.

[*Note* :—Although at the time this article was penned there would seem to be no direct Madras decision on the question discussed herein, it was discussed in later cases. In *Jagapati Mudaliar* v. *Ekambara Mudaliar*[2] the question arose for decision and it was held by *Subrahmanya Aiyar* and *Benson* JJ. that it was not comtent to a pleader to enter into a compromise on behalf of his client

1. (1812) 15 East 400; 104 E. R. 896.   2. (1897) I.L.R. 21 M. 274.

without his express authority to do so. The learned Judges observed that the practice prior to the decision was in accordance with the conclusion arrived at by them. For, they observed: "Moreover, so far as this presidency is concerned, it has been hitherto tacitly understood by all that a Vakil has no implied authority to enter into a compromise on behalf of his client, as is manifest from the practice of the Courts which invariably insist upon the production of special authority from the client expressing consent to the compromise entered into on his behalf by the Vakil before the compromise is accepted by the Court." As pointed out in that case and over and over again in other cases (see *Venkata Narasimha* v. *Bhashyakarlu*[1]) a distinction has to be drawn between the authority of a pleader to make a compromise and his authority to make binding admissions as to relevant facts. A pleader has authority to make admissions relating to relevant facts and from the necessity of the case this must be so; his admissions on facts in issue and relevant facts in the case must necessarily bind the client. It has been held by the Judicial Committee in the *Vallur case*[1] that a Vakil's general powers in the conduct of a suit include the abandonment of an issue which in his discretion he thinks it inadvisable to press. It has of course been held that his admissions on points of law are not binding (*Nilakanta Rotho* v. *Gongapani Panda*[2]). This, however, is no exception to the principle. Admissions are not conclusive and do not operate as estoppels, so that the admission by a pleader on a point of law or the abandonment of a point of law on the ground that in the vakil's opinion the point was concluded by authority and therefore not arguable will not preclude the party from arguing the point again in appeal or even in the same court[3]. But even though the admission or the abandonment is not based on this ground, such admission or abandonment on a point of law is not binding upon the client[4].

1. (1902) I.L.R. 25 M. 367 (P.C). 2. (1898) 8 M.L.J. 217.

3. *Rajunder Narain Rae* v. *Bijai Govind Sing* (1839) 2 M.I.A. 253 (259); *Kower Narain Roy* v. *Sreenath* (1868) 9 W. R. 485; *Kaleekanund Bhuttacharjee* v. *Gireebala Debia* (1868) 10 W.R. 322: *Bhut Nath Sircar* v. *Ram Lall Sircar* (1900) 6 C.W.N. 82; *Venkata Narasimha Naidu* v *Bhashyakarlu Naidu* (1902) I. L. R. 25 M. 367; *Krishnusami* v. *Rajagopala* (1895) I. L. R. 18 M. 73 (83); *Beni Pershad* v. *Dudh Nath Roy* (1899) L. R. 26 I. A. 216 S. C. I. L. R. 27 C. 156 (163); *Krishnaji* v. *Rajmal* (1899) I. L. R. 24 B. 360; *Dwar Baksh* v. *Fatik Jali* (1898) 3 C. W.N. 222; *Harihar Ota* v. *Dasarathi Misra* (1905) 9 C.W.N 636 (642); *Narayan* v. *Venkatacharya* (1904) I.L.R. 28 B. 408.

4. *Jotendro Mohun* v. *Ganendra Mohun* (1872) 18 W. R. 359, (367). *Musst Aekjoo* v. *Lallah Ramchandra* (1875) 23 W. R. 400 (401); *Krishnasami* v. *Rajagopala* (1895) I. L. R. 18 M. 73, (83).

Even in England, Courts are taking a more sensible view upon the question of the authority of Counsel. In *Neale* v. *Gordon-Lennox*[1] the House of Lords has recently decided that a counsel has no authority to refer an action against the wishes of his client or upon terms different from those which his client has authorized. If he does not refer it, the reference may be set aside although the limit put by the client on his counsel's authority is not made known to the other side when the reference is agreed upon. The Court before whom the question of setting aside the reference comes is not bound to sanction an arrangement made by counsel which is not, in the opinion of the Court, a proper one. The observations of the late Lord Chancellor (*Earl of Halsbury*) are well worth perusal[2]: "I will not go through the cases, because to my mind there is a higher and much more important principle involved. The Court is asked for its assistance—and I entirely repudiate the technical distinction between what is called an application for specific performance and an order to be made that such and such things should be done—the Court is asked for its assistance when this order is asked to be made and enforced that the trial of the cause should not go on; and to suggest to me that a Court of Justice is so far bound by the unauthorized act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard * * * * * I will only say for myself that I should absolutely repudiate any such principle. Where the contract is something which the parties are themselves by law competent to agree to, and where the contract has been made, I have nothing to say to the policy of law which prevents that contract being undone : the contract is the law final and conclusive. But when two parties seek as part of their arrangement the intervention of a Court of Justice to say that something shall or shall not be done, although one of the parties to it, is clearly not consenting to it, but has in the most distinct form said that the consent to refer—to take it from the jurisdiction of the ordinary tribunal—shall only be on certain terms, to say that any learned counsel can so far contradict what his client has said and act without

1. (1902) A. C. 465. 2. (1902) A.C. 465 at pp. 469 470.

the authority of his client as to bind the Court itself, is a proposition which I certainly will never assent to."

So that according to the English law the Counsel seems to have authority to compromise a suit in which he is engaged as a Counsel, although it is now settled that he cannot exercise his authority when his client gives him instructions not to compromise or against the express wish of his client (*Carrison* v. *Rodrigues*[1]) or when the counsel has acted under a misapprehension of his authority (*Nundo Lal* v. *Nistarini Dassi*[2].) But this rule of English law, that counsel has authority to enter into a compromise, is according to the eminent Judges, going a little too far and has certainly not been applied in India (*Bhut Nath Sircar* v. *Ram Lall*[3].) As observed by Mr. Justice *Bannerjee* in that case, there ought not to be any difference between the privilege of an advocate and that of a vakil. In some of the English cases, the existence of this authority is based upon the theory of Principal and Agency. But seeing, that according to the theory equally recognized in the English law, the counsel's services are honorary and that counsel has nothing to do with the client and he is not entitled to receive instruction from him, the relation of Principal and Agency has no place, and if it has no place one cannot see whence his authority to compromise can be derived.

As regards an attorney, it seems also to be undoubted according to the English law, that " an attorney, though he has not obtained express authority from his client for the purpose, has yet power to enter into a compromise on behalf of the latter." But this principle has not been accepted in many of the American Courts. See *Levy* v. *Brown*[4] and *Jagapathi Mudaliar* v. *Ekambara Mudaliar*[5]. As observed in that case, it will be unsafe to extend this rule of English law to India.

So that it may now be taken to be settled that a legal practitioner in this country has no authority to compromise nor has he any authority to refer the suit in which he is engaged to arbitration (*Thakoor Pershad* v. *Kalka*[6] and *Sadashiv* v. *Maruti*[7])

1. (1886) I. L. R. 13 C. 115.
2. (1900) I. L. R. 27 C. 428.
3. (1900) 6 C. W. N. 82 at pp. 86—87.
4. (1836) 30 American Reports 359.
5. (1897) 21 M. 274.
6. (1874) 6 N. W. P. 210.
7. (1890) I. L. R. 14 B. 455.

nor can he bind his client to abide by oath of the other party (*Hakeemoonnissa* v. *Buldeo*[1], *Sadashiv* v. *Maruti*[2] and see *Rajender Chunder* v. *Mahomed Aynooddeen*)[3] :—ED.]

[* 379.]

*CRITICAL NOTES.

Pribhu Narain Sing *v.* Sita Ram.—I.L.R. 13 A. 94. —In this case the learned Chief Justice, Sir *John Edge*, of the Allahabad High Court, decided a question of frequent occurrence in connection with the payment of stamp duty in redemption suits. A mortgagor who obtained a decree for redemption on payment of a certain sum to the mortgagee, appealed to the High Court, on the ground that the decision of the lower Court with regard to the amount he was bound to pay to the defendants was wrong. The question arose whether the stamp duty payable on appeal was to be computed on the principal amount secured by the mortgage instrument or on the amount in dispute between the parties in the Appellate Court. Cl. IX of S. 7, of Act VII of 1870, provides that in suits to redeem and in suits for foreclosure the stamp duty is to be calculated on the principal amount secured by the mortgage instrument. It was contended by the appellant in the case that as the right to redeem was not in contest in appeal, and as the dispute between the parties related only to the amount due to the mortgagee, the character of the suit had been changed in appeal and was merely one for money, and stamp duty was therefore leviable only on the amount in dispute in appeal and the cases of *Ram Lakhan Rai* v. *Bandan Rai*[4] and *Hafiz Ahmad* v. *Sobha Ram*[5] were relied on. The taxing officer referred the question to the Chief Justice on the ground that a ruling of the Bombay High Court quoted in a foot-note to *Umar Khan* v. *Mahomedkhan*,[6] was in conflict with the view adopted by the Allahabad High Court, that when the right to redeem is not in dispute in appeal, the amount in contest affords the criterion for valuation. The learned Chief Justice ruled that the relief claimed in appeal was really " a decree for the redemption of the mortgaged property on payment of the amount, if any, which is due, " and was

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1. (1868) 3 Agra 309.
2. (1890) I.L.R. 14 B. 455.
3. (1864) W. R. 143.
4. (1880) 1 Legal Remembrancer, 162.
5. (1884) I. L. R. 6 A. 488.
6. (1885) I. L. R. 10 B. 41 at p. 44.

incapable of valuation, and stamp duty should therefore be paid on the principal amount stated in the instrument of mortgage under S. 7, Sub.-S. (ix) of the Court-Fees Act, but he proceeded to observe: "If on the other hand, the decree below had decreed redemption on payment of, say, Rs. 500, and the defendants-mortgagees were appealing on the ground that the amount due was Rs. 200,000, I am of opinion that the amount of Court-fee should be calculated on the difference between Rs. 500 and Rs. 200,000." With regard to the actual ruling in the case, there can hardly be any doubt that it is right and the learned Chief Justice's reasoning is conclusive[1]. A contrary view was no doubt expressed in a pre-emption case, *Hafiz Ahmed* v. *Sobha Ram*, [2] where the Judges observed that if a pre-emptor who has obtained a decree* for possession on payment of [* 380] a certain amount, appeals only on the ground that the amount ordered to be paid to the defendant was excessive, the stamp duty would be leviable on the difference between the amount admitted by the pre-emptor, and not as in a suit for pre-emption; but the observation was only an *obiter dictum*, the actual decision in the case being, that inasmuch as the right of pre-emption was in dispute in the case as a fact, duty was payable as in a suit for pre-emption. But the *obiter dictum* in the case under notice of Sir *John Edge*, C. J., that if the appeal had been by the defendant and related only to the amount due to him, the valuation would be according to the difference between the amount claimed and the amount admitted,[1] seems as much open to question as the *dictum* in *Hafiz Ahmed* v. *Sobha Ram*[2]. The distinction drawn by the learned Judge is not easy to perceive. If when the mortgagor claims to pay a less sum, the appeal concerns the right to redeem, it seems equally to follow that where the mortgagee resists redemption on the ground that a larger sum is due to him, the appeal concerns the right to redeem. In the one case, the Court having allowed redemption on payment of a certain sum of money to the mortgage, the mortgagor claims the right to redeem on the condition of paying a less sum; in the other the mortgagee seeks to establish that there is no right to redeem except on condition of paying a larger sum than that decreed by the Court below. The

1. But see note at the end. 2. (1884) I. L R. 6 A 488.

matter in contest in both cases is the right to redeem because the point to be determined in both cases is the condition on which redemption is to take place. In a suit to redeem, the mortgagee cannot get a decree for the amount due to him. The object of his appeal therefore is not to get a decree for more money, but to resist redemption by the plaintiff unless a large sum of money be paid. This is the view that the Bombay High Court seems to have taken as appears from the minutes of the Judges quoted in the foot-note to the case already referred to. The Madras High Court, however, has adopted a different view in somewhat analogous cases. In suits to redeem kanom mortgages in Malabar, where the lower court decrees redemption, and the mortgagee appeals on the ground that a larger sum of money ought to have been decreed to him for improvements (the value of which the jenmi is bound to pay before redeeming) the Madras High Court has held that stamp duty should be paid on the additional amount claimed for improvements and not on the principal amount secured by the kanom deed. (See S. A. No. 599 of 1889, 47 of 1889, and 194 of 1889), but the rulings on the point have not been reported, and it is possible that a different view may prevail when the question comes on again for argument. As it is, there may be the anomaly of the necessity of
[* 381] *presenting appeals in redemption cases in the High Court although the original suit may have been tried in a Munsiff's Court. Suppose, for instance, when the principal secured by the instrument is Rs. 2,000, the mortgagee claims Rs. 12,000 as due to him in all, and the Court decrees only Rs. 2,000; if the appeal is to be valued according to the difference between the amount claimed and the amount decreed, it will have to be presented in the High Court. The anomaly is all the more striking on the Allahabad view, for, if in addition to claiming that amount, he denies the right to redeem, the appeal must be valued according to the principal amount of the mortgage and will therefore lie to the District Court.

[NOTE.—According to Sir *John Stanley*, C.J., in *Nepal Rai* v. *Debi Prasad*[1] "S. 7 is confined to a suit apparently and not to an appeal." So that S. 7, Sub-S. (ix) which applies to redemption suits does not apply to an appeal from a decree in a redemption suit,

1. (1905) I. L. R. 27 A 447.

whether such appeal is preferred by the mortgagor or by the mortgagee. But whatever may be the view as regards the other clauses of the section (S. 7) there can be no doubt that Cl. (iv) of S. 7 has application also to appeals and that the Chief Justice of the Allahabad High Court was not adverting to the provisions of this clause or, if he was so adverting, the language used by him is at any rate too wide. S. 7, Cl. (iv), enacts that in the suits specified therein (and there are 5 classes of suits referred to in this clause) the Court-fee shall be calculated "according to the amount at which the relief sought is valued in the plaint or memorandum of appeal." The reference to suits in the beginning of the clause and the reference to plaints and memoranda of appeal at the end would seem rather to show that the Legislature was using the term 'suits' in a rather wide sense as including appeals. The reference to suits, when the Legislature imposes at the end for the purpose of payment of court-fees an obligation to state the amount at which the relief is valued, only confirms this view. The last para of the clause enacts that "in all such suits the plaintiff shall state the amount at which he values the relief sought." The necessity for valuing the relief will be felt both in suits and appeals. The same object which necessitates the valuation in a suit will necessitate it in an appeal. But if the last para is confined to suits and not to appeals, one cannot understand whether the inference to be drawn is that there is no obligation in appeals. However, the decision in *Nepal Rai* v. *Debi Prasad*[1] has been followed by the Madras High Court in a recent case—see *Reference under Court Fees Act*, 1870[2]. The language of the learned Judges in this case is, however, more guarded. They held that S., 7, Cl. (ix), of the Court-fees Act applied only to *suits* and not to *appeals*, and that appeals, unless otherwise provided for, were governed by Schedule I, Art. 1. We must take it that the question whether S. 7 generally applies only to suits and not to appeals is still open in Madras—see *Ramakrishna Reddi* v. *Kotta Kota Reddi*[3].

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1. (1905) I. L. R. 27 A. 447.

2. (1906) I. L. R. 29 M. 367. But see *Vasudeva* v. *Madhava* (1892) I. L. R. 16 M. 326.

3. (1906) I. L. R. 30 M. 96 (98).

Mortgage-suits may be of 3 classes:—(1)suits for redemption, (2) suits for foreclosure, and (3) suits for recovery of mortgage-money by sale. There may also be a fourth class, *viz.*, suits for recovery of possession of mortgaged property by mortgage, but these suits may be left out of consideration for the present. The first refers to suits by the mortgagors, while the second and third refer to suits by mortgagees. In redemption suits S. 7, Cl. (ix), applies expressly. And apparently even if arrears of rent are asked in such a suit Court-fee is payable on the principal sum[1]. Be this as it may, if there is an appeal from a decree in that suit different considerations arise. If the decree of the first Court is one dismissing the suit and the mortgagor appeals, the question is, what is the stamp duty payable, or upon what basis the Court-fee is to be calculated. In the *Reference under the Court-Fees Act*[2] it was held by the Madras High Court, apparently following the reasoningof the decision in *Pirbhu Narain* v. *Sita Ram*[3] that S. 7, Cl. (ix), applied to such a case also. But apparently this view cannot be entertained after the two recent cases in Madras and in Allahabad already referred to[4]. According to these, the article applicable is Art. 1, Sch. 1, and not S. 7, Cl. (ix), and these were cases of appeals by the mortgagors Of course, in both these cases, the suit for redemption was not dismissed; the decree appealed against was redemption on payment of a certain sum of money, the mortgagor contending that it ought to be less. But this can make no difference in principle. If the mortgagee appeals, that can only be on the ground that there is no right to redeem or that more money is due and must be paid before redemption can be directed. The subject-matter in dispute in appeal determines the Court-fee[5]. In a case where the mortgagee alleges that a larger sum is due calculation is easy, but if his contention be that there is no right of redemption it is difficult to value the subject-matter in dispute which, in this case, is the land mortgaged. Similar principles must be held to apply to suits for foreclosure by the mortgagee and appeals in decrees from such suit.

1. *Rama Varma v. Kadar*: (1892) I. L. R. 16 M. 415.
2. (1891) I. L. R. 14 M. 480.
3. (1890) I. L. R. 13 A. 94.
4. *Nepal Rai v. Debi Prasad* (1905) I. L. R. 27 A. 447. *Reference under Court Fees Act*, 1870 : (1905) I. L. R. 29 M 367.
5. *Reference under Court Fees Act* 1870 : (1905) I. L. R 29 M. 367.

In the case of suits for sale S. 7, Cl. (i), will apply. If the appeal is by the mortgagee for the recovery of more money, even if the clause be held not to apply, there is no difference in the result as the subject-matter in dispute in appeal under Art. 1, Sch. 1, will be the same. Court-fee has to be paid on the difference between the amount claimed and the amount awarded. If the appeal is by the mortgagor, on the ground that only a less sum is due, the same principle will hold good. If, however, the appeal is by the mortgagee that certain lands exonerated ought to be included, or by the defendant (or mortgagor) that certain lands included ought to be exonerated different considerations arise. The recent Full Bench decision in *Ramakrishna Reddi* v. *Kotta Kota Reddi*[1] covers such a case. The value for purposes of court-fees is the value of such lands or properties when such value is less than the amount decreed, and when such value exceeds the decree amount, such decree amount. But what is the guide for determining the value of the properties in appeal has still to be answered if S. 7 has no application to appeals[2].—ED.]

Kunhamed v. Kutti.—I. L. R. 14 M. 167.—In this case, an interesting question arose for decision. A suit was brought for a declaration that a judgment obtained by the defendant against the plaintiff in a prior action was given fraudulently and therefore void; and the fraud alleged was the payment of a bribe to the Judge who passed the decision on first appeal. The High Court held that such a suit was not maintainable. They suggested that the appropriate form of relief was an injunction restraining the defendant from executing his decree in the prior suit. The plaint appears to have been badly drawn, for a mere declaration, even if granted, would not have availed the plaintiff, and the prayer being limited to the judgment of the appellate Judge, the decree passed in second appeal by the High Court would remain unaffected. But the High Court (*Collins* C. J. and *Parker* J.) disposed of the case on the broad ground that a suit for such a declaration did not lie. A declaration that a judgment between the same parties was obtained fraudulently would amount to a setting aside of the decree and all subsequent

1. (1906) I. L. R. 30 M 96.

2. The case of *Ramasami* v. *Subbusami*, (1890) I. L. R. 13 M 508, if going beyond the principle above stated must be taken to have been overruled by the F. B. decision in *Ramakrisna Reddi* v. *Kotta Kota Reddi*: (1906) I. L. R 30 M. 96.

proceedings in the prior action. The High Court held that a suit for such declaration or for an order setting aside the decree could not be brought. We find great difficulty in accepting this decision as correct. That the suggested relief by way of an injunction is the only proper remedy in all cases of corrupt judgments can hardly be supported. It is clear where the prior decree was declaratory, or directed the dismissal of the suit, or execution of it was complete, that an injunction, *restraining execution*, would be altogether meaningless. Their Lordships refer to *Dhuronidhur Sen* v. *The Agra Bank*[1], but it is no authority for the proposition sought to be supported. That was a suit by a person illegally brought upon the record as the representative of a judgment-debtor, when he was not such representative, to restrain by injunction the decree-holder from executing the decree against him. The Calcutta Court did not say that a judgment obtained by fraud could not be set aside or declared fraudulent.

[* 382] *When the fraudulent decree is one capable of execution, and remains unexecuted, an injunction restraining execution will be a proper consequential relief to a declaration that the decree is fraudulent.

An action to set aside a decree on the ground of fraud is a well-recognized proceeding in England and America. Article 95 of the Indian Limitation Act indicates the recognition of the same class of suits in this country. Although a review of judgment might be an appropriate means of redress in many cases where a judgment had been fraudulently obtained, it is obvious that S. 624 of the C. P. C. (when the presiding Judge is different) cannot cover all cases of fraud which require a remedy. And it seems pretty clear to us that the case we are considering, of a corrupt judgment, does not fall within the words "new and important matter or evidence." An action to set aside the judgment on the ground of fraud is the only remedy available in such cases. The action is somewhat peculiar. The plaintiff has not to prove consequential damage to maintain the action. It is enough that the Judge has received the bribe. The prayer of the plaintiff is not for damages on the ground of fraud. He seeks to

1. (1879) I. L. R. 5 C. 86.

set aside the judgment. The question also arises what right of the plaintiff has the briber infringed to give him a right of action. Anomalous as it may appear, an action to set aside a judgment is an established proceeding. Whether on the basis of a right to an honest judgment of the Judge or otherwise, the suit lies. BIGELOW says, in his work on *Fraud*, p. 87: "The fraud for which a judgment may be set aside or impeached collaterally must be actual and consist (1) in meditated and intentional contrivance to keep the parties and Court in ignorance of the real facts of the case, and obtaining the judgment by such contrivance, or (2) in facts relating to the manner of obtaining jurisdiction of the cause, to the mode of conducting the trial, or to some *concoction of the judgment*, or (3) in facts not actually or necessarily in issue at the former trial." See also *Hoffman* J. in *United States* v. *Flint* [1]: "It is true that a decree may be avoided by showing that it was obtained by fraud, but this must be fraud in its concoction such as *corruption of the Court*, collusion between the parties, or other circumstances which would establish that what seemed a decree was in fact no decree; that it was *fabula non judicium*." We shall be in a position to answer the question as to the juristic nature of this action to set aside the judgments for fraud, if it is determined whether the fraud must be connected with the opposite party to render the judgment avoidable. Suppose the Judge had been bribed not by the successful party but by a stranger who had a collateral interest in the result, or suppose it is not a bribe but personal influence brought to bear upon the Judge. Is the action maintainable? *Says BIGELOW, p. 107, on the authority of some American cases:— [* 383] "Clear proof of any corruption in favour of one of the parties will, of course, afford good ground to the opposite party, if defeated, for another trial. If the Judge should write a letter to the Jury, after the adjournment of the Court, relating to the cause committed to them, a new trial would be granted; so too if, without the consent of the parties, the Judge should visit the Jury in their consulting room." We shall return to a consideration of this question on another occasion.

It may also be, that the Judge who has received a bribe for deciding a cause, is disqualified, on the ground of interest in the

1. U. S. Circ. Court, Cal. Sep. 1876.

result of the case, to adjudicate on the matter, and that his judgment is liable to be set aside in appeal.

MISCELLANEOUS.

Special Proxy:—Form No. 76 appended to the Bankruptcy Rules, 1886 and 1890, prescribes the form of special proxy to be used by a creditor desirous of being represented by another person at a meeting of creditors. The form contains, after the words of the instrument of proxy, the words 'Signature of witness.' Is the instrument valid if signed by the proxy himself as witness? This was the question raised in the case of *In re Parrott, Exparte Cullen*[1], and recently decided by a Divisional Court consisting of Mr. Justice *Cave* and Mr. Justice *Charles*. The analogous case of *Seal* v. *Claridge*[2] assisted the Court in the discovery of the principle to be applied. There the Court of Appeal held that the grantee of a bill of sale could not, although a solicitor, be the attesting witness thereof under S. 10 of the Bills of Sale Act, 1878, the ground of the decision being that the grantee was a party to the transaction and had an interest, if inclined to be fraudulent, in deceiving the grantor. Is it then a principle of the English Law that a party to a transaction cannot be an attesting witness, or was the decision in *Seal* v. *Claridge*[2] founded on the special requirement of the Bills of Sale Act providing that the attesting solicitor should explain the bill of sale to the grantor? We do not propose to follow the Court through the learned disquisition, including an examination of the Roman Law, by which a general principle was discovered to exist excluding parties to a transaction from being competent attesting witnesses. Suffice it to say that this principle does exist, was applied in *Seal* v. *Claridge*,[2] and applies to the case in question of a proxy witnessing the instrument of proxy appointing him, he being a donee of the power, and therefore, although taking no beneficial interest, not a stranger to the transaction. *Freshfield* v. *Reed*,[3] which was referred to, has not much bearing upon the point, as the decision there was that a consent in writing is not duly attested simply by the consenting party being a party to the deed to which his consent is required, if his signature is not attested by a witness. The fact

1. (1891) 2 Q. B. 151.
2. (1881) 50 Law. J. Rep Q B. 316.
3. (1884) 9 M. & W. 404.

that no authority is to be found in the English *Law for the [* 384] general proposition on which the case was decided is probably due to the fact that the far wider rule excluding witnesses on the ground of interest obscured the narrower, but far more reasonable, rule incapacitating a party to a transaction from being an attesting witness.—*Law Journal.*

Ex-President Cleveland's Advice to Young Lawyers:—If I were to tender any advice to young men in the legal profession or contemplating such a career, I think I could not refrain from asking them to dismiss from their minds the idea that the practice of the law is made up in an important degree of oratory and eloquent addresses before the Courts and Juries. No one should enter this profession who is not prepared to do very hard, continuous, and often irksome work. I shall follow this advice by saying that there is no mistake about another fact—to wit: In the practice of law, as in everything else, honesty and frank fair dealing is not only enjoined by good morals, but is the best policy. It is a delusion to suppose that the noble profession of the law can be faithfully pursued or successfully practised by trickery and over-reaching subterfuges—*N.Y. Law Journal.*

Gifts to children, construction of.—Probably the legal presumption that a gift by a father to one of his children of any large sum of money in his lifetime is intended as an ademption *pro tanto* of what he has left to that one by his will frequently frustrates the father's intention; and the decision of the Court of Appeal in *Lacon* v. *Lacon*[1], reversing that of the Court below, will be hailed with general satisfaction. It may be remembered that Sir E. Lacon was the owner of twenty-one twenty-fourth shares in a brewery business. By his will he bequeathed those shares to three of his sons, of whom E was one, providing that, except E, they should not be allowed to take any part in the management of the business. After the date of the will, E who had been employed in the business for some time at a salary, asked for an increase of it. His father would not grant him this, but gave him, on a re-constitution of the partnership, two shares therein. E resisted the theory of ademption on the ground that he had purchased the shares,

1. (1891) 2 Ch. 482.

giving his services in exchange and as the consideration for them; and further, that the presumption of ademption did not even *prima facie* arise in the case of property of this kind. Mr. Justice *Romer* disagreed with him on both grounds: but he has been successful in the Court of Appeal. The leading case on this subject is *Ex parte Pye*[1], and in the notes on that case in White and Tudor's 'Leading Cases' (6th Ed., Vol. ii, p. 364) will be found many cases showing the strong presumption there is in the eye of the law, that a gift of a large sum of money to a child is intended by a person in *loco parentis* as an ademption *pro tanto* of any money bequeathed to that child in a will previously made. But we do not generally regard as a gift anything which we have paid for, and what difference can it make that we have not used the medium of exchange, but have given our services instead of a money payment? E's two shares were really bought by him, and, therefore, were put out of the [* 385] power of his father's will. The Court * of Appeal seem further to have left open, for the decision of some further leading case, the question whether the presumption of ademption can be applied to shares of this kind.—*Law Journal.*

"*The Evidence in Criminal Cases Bill*" recently introduced by the Lord Chancellor seeks *inter alia* to make a person charged with an offence a competent witness on every hearing at every stage of such charge, but provides that no such person shall be a compellable witness (unless so compelled heretofore). The change is required quite as much in this country as in England. Very often, the accused is the only person able to speak to important facts connected with the charge against him, and it is certainly unfair and inconsistent with the humane spirit of English law to prevent him from deposing such facts on oath. No doubt he can at present state such facts to the Judge or Jury in support of his innocence, but he has very little chance of being believed against witnesses *who speak on oath and are liable to cross-examination.* The change introduced by the English Bill will complete the demolition of the old but crude rule that a party cannot be a witness in his own cause.

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1. (1811) 18. Ves. 140.

* SUMMARY OF ENGLISH CASES. [* 417]

Bellamy *v.* Debenham. [1891] 1 Ch. 412.

Agreement to buy house—Time for perfomance—Vendor acquiring title after time—Buyer's right to rescind.

The defendant, by a letter of the 17th April 1889, offered to purchase the plaintiff's house for £800. The offer was accepted by plaintiff by letter, dated 25th April 1889, who promised to deliver possession by the 24th June. Subsequently disputes arose between plaintiff and defendant as to the terms of the sale. The defendant, finding that plaintiff was not entitled to the mines, repudiated the agreement. The plaintiff entered into negotiation with the owner of the mines for purchasing his rights, but did not succeed in doing so before September. The plaintiff sued for specific performance. *Held* by the Court of Appeal; (1) that the plaintiff not having on the date of the contract, the freehold title which he had agreed to convey, the defendant was justified in rescinding the contract and the plaintiff was not entitled to specific performance; (2) that he not having the freehold title on the date fixed for delivery, he was not entitled to damages. *Quaere.*—Whether, if on the date of delivery he was in a position to convey the freehold interest, he would be entitled to institute a suit for damages.

In re Heseltine: Woodward *v.* Heseltine. [1891] I Ch. 464.

English Bill of Sale Act—Sufficiency of address—Grantee's name, omission of.

The Bills of Sale Act, 1882 (45 & 46 Vic., Ch. 43) requires among other things that (1) the name of the grantee should be given in the bill of sale, and (2) the proper address of the attesting witness should be stated. In a bill of sale, the attesting witness was described as W. G. Cleverly, Clerk to the Discount Bank of London, 6, Duncannon St, Charing Cross, while he was really residing at 12 X, Peabody Avenue, Pimlico. *Held* by the Court of Appeal, differing from the view of *North* J. (1) that as the object of requiring the address is to give such information as would enable a person to find the witness, and as the address given in the bill of sale was the place where the witness resided all day, the address was

sufficient ; (2) the grantee was described as ' The Discount Bank of London of 6, Duncannon St., Charing Cross, of which said bank Lewis Simmons of the same place is the sole proprietor. *Held* that as no irresistible inference could be drawn on the face of the bill of sale, that Lewis Simmons was the bank, the bill of sale was not in the statutory form and was invalid.

Elve v. Boyton. [1891] 1 Ch. 501.

Will—Trustee—Company incorporated by Act of Parliament —Shares investment of trust funds.

The trustees under a will were empowered to invest the trust funds *inter alia* upon the security of "the stocks, shares, or securities of any company incorporated by Act of Parliament and paying a dividend." The trustees invested in the purchase of stock of the London Assurance Company which was created by a charter from the Crown, the Crown being empowered to grant the charter under the provisions of an Act of Parliament. *Held* that the London Assurance Company was one incorporated by Act of Parliament, to create such a corporation by charter.

Cooke v. Smith. [1891] 1 Ch. 509.

Discovery of documents—Putting documents in bundle.

In this case it was held, *inter alia*, that when discovery of documents is made, it is not enough to put all the documents
[* 418] *into bundles and mark the bundles ; the documents in the bundle must be described and each document must be marked or numbered specially, so that any party requiring a particular document may call for it.

In re **Queensland Mercantile and Agency Co.**
Ex parte **Australasian Investment Co.,**
Ex parte **Union Bank of Australia.** [1891] 1 Ch. 536.

Conflict of laws—Company domiciled in Queensland, shares in—Unpaid capital, assignment of, as security—Arrestment order, effect of.

The unpaid capital in respect of shares of a company domiciled in Queens-land was assigned as security to a Bank *U* of Australia which held debentures issued by the *Q* Co.

The assignment to the *U* Bank was complete and valid according to the law of Queensland. After the unpaid capital had been called but not paid, a company *A* sued the *Q* Co. in Scotland and obtained an arrestment order with respect to calls. According to Scotch Law the arrestment order was equivalent to an assignment of the calls in question duly intimated to the debtors and had priority over any prior assignment without such intimation. *Held* by *North* J. that, although a transfer of personal property, valid by the law of the owner's domicile, is valid wherever the property is situated, yet as a transfer of movable property duly carried out according to the law of the place where the property is situated is not rendered ineffectual by such transfer not being in accordance with the law of the owner's domicile, the arrestment of the shares in Scotland which was a complete assignment of the calls, accordingly gave a preferable title to the *A* Co. over the *Q* Co., whose assignment was not intimated to the debtors.

Moore *v.* Knight. [1891] 1 Ch. 547.

Firm of Solicitors—Deposit by client—Embezzlement by clerk—Payment of interest—Limitation— Trustee Act, S. 8.

The plaintiff deposited various sums of money with a firm of solicitors for investment between 1867 & 1874. It was represented to the plaintiff that her money had been invested and she received interest from the firm till 1886 in which year it was discovered that most of the plaintiff's money had been embezzled by a clerk of the firm and had never been invested. Plaintiff sued the representatives of the partners (who were all dead) for the recovery of her money. The executors of one of the partners pleaded limitation. *Held*: that the plaintiff was entitled to recover the sums deposited with interest from 1886, first out of the joint estates of the firm, and secondly, if it proved insufficient, out of the separate estates of the members of the firm, and the Trustee Act of 1881, S. 8, did not bar the suit. [*Blair* v. *Bromley*[1] followed.]

In re **Whiteley and Roberts' Arbitration.**
[1891] 1 Ch. 558.

Award—Motion to set aside—Misconduct of arbitrator—Bribery—Admission out of court by arbitrator—Admissibility—Evidence.

In a motion to set aside an award on the ground of its having been improperly procured; an admission made out of

1. (1847) 2 Ph. 354; 67 E. R. 1026.

Court by an arbitrator that he made his award improperly, as for example that he has been bribed, is not admissible in evidence.

Ashling v. Boon. [1891] 1 Ch. 568.

Pronote—Insufficiently stamped—Admissibility— Evidence—English Stamp Act, 1870.

A promissory note, insufficiently stamped, is inadmissible in evidence under the Stamp Act of 1870, to prove the receipt of the money for which the note was given.

[* 422] *** Mills v. Dunham.** [1891] 1 Ch. 576.

Master and Servant—Travelling agent—Contract of employment—Covenant not to solicit orders from customers of employer—Restraint of trade—Severability—Construction—Ambiguity.

An agreement by a travelling agent with his employer that he would not after the termination of the service "call upon, or directly or indirectly solicit orders from, or in any way deal or transact business with" any one who had during the employment been a customer of his employer was construed as referring to business of a similar kind to that carried on by the employer and was held to be reasonable and valid.

Where a covenant is impeached as being in restraint of trade, the covenant must first be fairly interpreted without reference to the rule of reasonableness and then the rule should be applied. When there is a question of severing the good from the bad part of a covenant, the Court must find in the agreement itself sufficient ground for making the severance.

Per Chitty J.:—If there is any ambiguity in the stipulation between employer and employed imposing a restriction on the latter, it ought to receive the narrower construction.

Per Kay, L. J.:—Where a clause is ambiguous, a construction which will make it valid is to be preferred to one which will make it void.

In re **Taylor, Stileman and Underwood,** [1891] 1 Ch. 590.

Solicitor's lien—Taxable costs, charges, and expenses—No lien for advance for other purposes—Taking security—Waiver of lien—Presumption.

A solicitor's lien extends only to all taxable costs, charges and expenses, but not to monies advanced for other purposes. Whether a lien is waived or not by taking a security depends upon the circumstances of the case. Where a solicitor takes a security for costs from his client, the *prima facie* inference is that he waives his lien.

In re **Parker : Wignall** *v.* **Park.** [1891] 1. Ch. 682.

Mortgage of rents &c—No interest in Land.

A mortgage by a local body of the rents, rates and waterworks authorised by statutes was held not to confer any interest in land.

* *In re* **Croom : England** *v.* **Provincial Assets Company.** [1891] 1 Ch. 695. [* 423]

Bankruptcy Act 1883 S. 18—*Arrangement transferring property—Trustee not entitled to after-acquired property.*

Where under S. 18 of the Bankruprtcy Act of 1883, a debtor entered into an arrangement with his creditors and transferred all his properties to a trustee, it was held that the scheme only conveyed to the trustee what the debtor was entitled to at the date of the approval of the scheme by the Court and did not convey after-acquired property, there being no special stipulation to that effect.

In re **Mabbett: Pitman** *v.* **Holborrow.** [1891] 1. Ch. 707.

Will—Direction for conversion—Purchase of Government annuity—Money available for purchase—Annuitant entitled to value on date money available—Maxim of Equity.

Where a will directs the purchase of a Government annuity for the benefit of a person, the annuitant may ask that the value should be paid over to him so soon as the money is available for the purchase and equity, treating that as done which ought to be done, considers it available even though the estate out of which it is to be purchased has not been sold, provided there is a direction for sale amounting to conversion.

Knowles *v.* **Scott.** [1891] 1 Ch. 717.

Company—Liquidator, no trustee, Only agent—Delay in performance of duty—No action for damages.

A liquidator is not strictly a trustee for the creditors or share-holders of a company in liquidation. His position is one of

agency to the company rather than trusteeship. He is not liable to an action for damages for delay in performing his duty when that delay was not wilful or fraudulent and in no way arose from *mala fides* on his part.

[* 424] *** Jones *v.* Merionethshire Permanent Benefit Building Society.** [1891] 2 Ch. 587.

Pronote—Threat of criminal proceedings against executant's relation—Illegal consideration—Suit for setting aside.

Williams J. decided that a person who executes a promissory note on account of threats on the part of the grantee to take criminal proceedings against a relation of the grantee for certain alleged defalcations is entitled to have it set aside on the ground that it was granted for an illegal consideration.

[* 425] *** Bentley *v.* The Manchester, Sheffield and Lincolnshire Railway Company.** [1891] 3 Ch. 222.

Railway statute—Power to deposit earth &c., in payment of damages—Ascertainment and award to be by Commissioners—Death of Commissioners—Right to bring suit.

In this case, the predecessors in title of the defendants obtained power to deposit earth and gravel removed from the bed of a river, upon the banks of the river, giving satisfaction for all damage done to the owner of the ground when the deposits were made. S. 7 provided that the damages should be ascertained and awarded by certain named Commissioners. The plaintiff sued for damages done to his land. The defendants resisted the action on the ground that the Commissioners named were dead and the plaintiff had no right to bring the action. *Romer*, J. set aside the defendant's plea and *held* that as the plaintiff's right to damages could no longer be enforced before the Commissioners, it was enforceable by action.

[* 418] *** Learoyd *v.* Brook.** [1891] 1 Q. B. 431.

Infant—Master and servant—Apprenticeship deed—Breach of covenant—Action by guardian for damages.

In an action by the guardian of a minor for damages or the return of the premium paid, in consequence of the breach of a covenant in an apprenticeship deed by the master (the defendant)

* to keep, teach the trade of a pawn-broker to, and maintain [* 419] his apprentice, the defendant pleaded that the minor apprentice was a habitual thief. *Held* that although in an ordinary apprenticeship deed, the covenants by the master are independent, the performance of which does not depend upon the performance by the apprentice, on his part, of the obligations imposed upon him by the deed, the master was absolved in this case, and the action must be dismissed, because the apprentice by his own acts had put it out of the power of the master to carry out what he had contracted to do, and as the only other remedy of successive prosecutions followed by suits for recovery of the losses caused by a habitual thief was very inconvenient. [*Raymond* v. *Minton*[1] and *Cox* v. *Mathews*[2] followed].

National Bank *v.* Silke, [1891] I. Q. B. 435.

Crossed Cheque—Bills of Exchange Act, 1882, *S.* 8—*Endorsement " account af National Bank "—No prohibition of transfer or negotiation.*

The defendant drew a cheque payable to the order of *M* for £450 and crossed it " Account of *M.* National Bank," and gave it to *M* who indorsed it to the National Bank, the plaintiffs. The cheque having been dishonoured by the Alliance Bank on which it was drawn, the plaintiffs whose account with *M* had been drawn upon, sued the defendant, the drawer of the cheque. *Held* that there were no words prohibiting transfer or indicating an intention that the cheque should not be transferred within the meaning of S. 8 of the Bills of Exchange Act (45 & 46 Vic., Ch. 61). *Semble*:—That a bill expressed to be payable to order, cannot be made not negotiable under S. 8, but assuming that it can, the intention to prohibit transfer must be more clearly expressed than in the present case. *Semble* :—A cheque payable to order or bearer cannot be made not negotiable except by crossing it in manner provided by Ss. 76-82.

Hammond *v.* Schofield. [1891] I. Q. B. 453.

Co-contractors, suit against—Judgment against one by consent —Bar against other—Rule of King v. *Hoare—No setting aside of judgment.*

1. (1866) L. R. I Ex. 244.

2. (1861) 2 F. & F. 397.

In an action against one of two co-contractors, judgment having been obtained by consent the plaintiffs moved to set aside the judgment by consent of the defendant, so as to enable them by amendment of the writ to proceed against the other contractor as well: *Held* by the Divisional Court (*Wills* & *Vaughan Williams* JJ.) on appeal, that the judgment could not be set aside by consent so as to evade the rule that judgment recovered against one of two joint contractors is a bar to an action against the other even through the plaintiff did not know when he signed judgment that he had a remedy against such other. See *King* v. *Hoare* [1] and *Kendall* v. *Hamilton.*[2] *Held* also, following *Odell* v. *Cormack*, [3] that a judgment signed by consent cannot be set aside at the instance of the plaintiff and defendant to the prejudice of a third party.

Miller *v.* Dell. [1891] I. Q. B. 468.

Lease—Fraudulent pledge by lessee's son — Bankruptcy of pledgee—Assignment by trustee—Demand by lessee—Refusal by assignee—Action for detinue and conversion—Limitation.

The plaintiff had a lease which his son fraudulently and without his knowledge deposited with *B* in 1881 as security for money advanced by *B*. *B* did not know of the fraud and on his bankruptcy the trustee assigned the debt and handed over the lease to the defendant in 1889. After demand and refusal plaintiff brought this action for detinue and conversion against the defendant. *Held* by the Court of Appeal that the statute of limitation began to run from the time that the plaintiff had a
[* 420] complete cause of action against the defendant whether or * not he had a previous cause of action against *B*; the statute therefore began to run from the date of the demand and refusal and did not bar the action.

Pittard *v.* Oliver. [1891] I. Q. B. 474.

Board of Guardians—Meeting—Defamatory statements about clerk by member at meeting—Privileged occasion—Presence of reporters not invited specially.

The defendant, a member, at a meeting of the Board of Guardians made certain defamatory statements about a clerk

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1. (1844) 13 M. & W. 494. 2. (1879) 4 A. C. 504.
3. (1887) 19 Q. B. D. 223.

to the Board, without malice and *bona fide* believing them to be true, in the presence of reporters who were present according to custom. The statements were incorrect. In an action for defamation, by the clerk, *held* by the Court of Appeal that the occasion was privileged, as it was the duty of the defendant to make the statements if he believed them to be true, and that the presence of the reporters, who, if they were ratepayers, would be interested in the matter, and if not, were not specially invited to hear the defamatory statements, would not take away the privilege.

Crumbie *v.* Wallsend Local Board. [1891] I. Q. B. 503.

Local authority—Street excavation—Plaintiff's land subsided—House, injury to—Fresh subsidence—Fresh cause of action—Public Health Act, S. 264.

An excavation made by a local authority under a street was not properly filled in and subsidence of the plaintiff's land with injury to house thereon took place in consequence, which began at a period more than six months before and went on continuously down to the commencement of an action by the plaintiff in respect of such subsidence. *Held* by the Court of Appeal that the further subsidence which took place within six months before action constituted a distinct cause of action in respect of which the action was maintainable notwithstanding S. 264 of the Public Health Act, which limits the period to six months for an action for anything done under the Act. *Held* further, following *Darley Main Colliery Co.* v. *Mitchell*[1] that there is no cause of action for any damage to plaintiff's property until it has occurred and that when a certain amount of damage has occurred, there is only a cause of action in respect of that amount. Cf. *Dwarka Nath Gupto* v. *The Corporation of Calcutta*[2].

Selig *v.* Lion. [1891] I. Q. B. 513.

Bankruptcy of plaintiff—Trustee unwilling to continue action—Unconditional order for stay of proceedings—Assignment to plaintiff after discharge from trustee—Plaintiff not entitled to removal of stay.

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1. (1886) 11 App. Cas. 127. 2. (1890) I. L. R. 18 C. 91.

The plaintiff in an action becoming bankrupt, the defendant obtained an unconditional order for stay of proceedings after notice to the trustee in bankruptcy who had signified his unwillingness to continue the action. The plaintiff, after discharge, got an assignment of all assets from the trustee and moved for the removal of the stay of proceedings. *Held* that in the absence of special circumstances the trustee would not have been entitled to it and that the plaintiff was not in a better position having got the assignment.

Abrahams *v.* Deakin. [1891] I. Q. B. 516.

Public-house—Manager—No authority to arrest after payment—Attempting to pass bad coin—False imprisonment.

The plaintiff and his friend went into the defendant's public-house and the friend tendered, in payment for some refreshment they took, a German gold 10 mark piece by mistake for a half sovereign and asked the barman for change. The barman went to fetch it but, before giving it, observed that the coin was a foreign one and took it back to the plaintiff's friend who gave him a half sovereign instead and the barman gave him the change. The plaintiff and his friend then left the house. A person who was acting as manager of the bar, in the absence of the defendant, followed them into the street and gave them into the custody of a policeman on a charge of attempting to pass bad money.

[* 421] * In an action for false imprisonment, *held* that, although the manager was liable as he told the policeman to arrest the plaintiff, the defendant was not liable as the manager had no implied authority by reason of his position to arrest the plaintiff, there being no such custom of the trade and the arrest having been made not for the purpose of protecting the employer's property which was no longer in danger but for the purpose of vindicating the law by punishing the plaintiff for a criminal offence which he was supposed to have already committed.

Pullman *v.* Hill & Co. [1891] I. Q. B. 524.

Libel by Company—Letter to firm dictated to Clerk by managing director—Copied by office-boy in press—Plaintiffs only some

of the partners—Not known to Company—Letter opened and read by firm's clerks—Publication—No privilege.

The defendants addressed a defamatory letter which had been dictated by their managing director to their clerk and copied by an office boy in a copying press to the firm of which the plaintiffs were only *some* of the partners, a circumstance not known to the defendants, and the letter was opened and read by the clerks of the plaintiff's firm. *Held* by the Court of Appeal that there was a publication to the plaintiff's clerks and the defendant's clerks and that neither occasion was privileged.

Turner *v.* **Goldsmith.** [1891] 1 Q. B. 544.

Contract—Principal and Agent—Agency for canvassing Principal's goods for five years—Samples to be sent to Agent from time to time—Principal's manufactory burnt down—No samples sent—Agent not employed—Implied term—Discharge of performance— Damages.

The defendant, a shirt manufacturer, agreed by a contract in writing, to employ the plaintiff and the plaintiff agreed to serve the defendant as agent, canvasser and traveller on the following terms; 1st, that the agency should be determined by either party at the end of five years by notice; secondly, that the plaintiff should do his utmost to obtain orders for and sell the various goods "manufactured or sold by the defendant as should from time to time be forwarded by sample or pattern to him." There was a further provision for a certain commission as remuneration to the plaintiff. The defendant's manufactory was burnt down two years after, and he did not resume business or employ the plaintiff. In an action for damages for breach of contract ; *held* by the Court of Appeal that the action lay and the plaintiff was entitled to substantial damages, for the defendant having agreed to employ the plaintiff for five years did not fulfil that agreement unless he sent him a reasonable amount of samples to enable him to earn the commission and that as there was no express or implied stipulation that the fulfilment of the contract depended on the continuation of the manufactory, the destruction of the manufactory by fire did

not excuse the defendant from carrying out his agreement [*Rhodes* v. *Forwood.* [1] and *Taylor* v. *Caldwell* [2] commented on.]

[* 423] *** Bowers *v.* Harding**: [1891] 1 Q. B. 560.

Income-tax—Husband and wife—Master and mistress of School—Joint salary—Husband liable to income-tax on salary of wife—Domestic servant employed for keeping house—No deduction on account of wages and maintenance—5 & 6 Vic. Ch. 35 S. 45.

A man and his wife who were master and mistress of a National School received a joint salary. He was assessed to income-tax on the joint income. A deduction was claimed from the taxable amount on account of the wages and maintenance of a domestic servant whose employment was necessary in order that the household duties might be carried on while the wife was engaged at school. The Court *held* that under 5 & 6 Vic., Ch. 35, S. 45, the profits of the wife were rightly charged as the profits of the husband and he was liable to assessment on the joint income, and that the deduction claimed could not be allowed as it was not for money wholly, exclusively and necessarily expended in the performance of the duties of his office or employment.

Langston *v.* Glasson, [1891] 1 Q. B. 567.

Income-tax—Members of corporate body not assessable—College—Bursar to be appointed by President and fellows—Person appointed as bursar on salary—Liability to income-tax.

The statutes of a college after declaring that the college should consist of a president, fellows and scholars, provided for the appointment by the president and fellows of a bursar, and gave them power to regulate the conditions of tenure, and the powers, duties and emoluments of the office. It was also provided that the college seal should not be affixed to any document except in the presence of the bursar (among others). The respondent was appointed bursar at a salary fixed by the president and fellows and paid out of the ordinary corporate revenues without deduction in respect of income-tax. *Held* that the respondent not being a member of a corporate body though a

1. (1876) 1 A. C. 256. 2. (1863) 3 B. & S. 826.

necessary officer of the college was liable to direct assessment as holding an office or employment of profit under Sch. E of the Income-tax Act of 1842.

*** Dillon v. The Corporation of Haverfordwest.** [* 424
[1891] I. Q. B. 575.

Income-tax—Corporation—Lighting town with gas—Statutory duty—Power to supply private customers for profit—Assessment of income-tax—Expenses of lighting the town—No deduction.

A duty was imposed by statute upon the respondent corporation of lighting a town with gas. And power was given to supply private customers with gas. The respondents made profits out of the private supply on which they were assessed to income tax. They claimed a deduction of the lighting expenses of the town as being money wholly and exclusively laid out or expended for the purpose of a trade within the meaning of 5 & 6 Vic., Ch. 35, S. 100, Sch D, r 1. *Held* that the lighting of the town and the supply of gas to private customers were separate and distinct operations, that no trade was carried on, until after lighting the town they began to supply gas to private customers, and therefore the expenses of lighting the town were not money expended for the purpose of the trade and could not be deducted.

Cawse v. Committee of Nottingham Lunatic Hospital. [1891], I. Q. B. 585.

Income-tax—Lunatic Asylum—Charitable Contributions—Self supporting by fees and income of farm—No exemption from inhabited house-duty and Land-lord's property tax.

The fact that an institution for the reception of insane persons, founded by charitable contributions, managed gratuitously and maintained by charitable subscriptions was self-supporting in a particular year out of the fees charged upon patients and the sale of the produce of a farm belonging to the institution, did not take it out of the category of institutions maintained in part by charity which were exempt from inhabited house duty and landlord's property tax.

In re **Mirams.** [1891] I. Q. B. 594.

Chaplain's Salary-Assignment to work-house—Not void—Public policy—Public office, test of.

An assignment of the salary of a chaplain to a workhouse is not void as against public policy because the office is not a public one. To make the office a public office, the pay must come out of national and not out of local funds and the office must be public in the strict sense of the term.

Shepherd *v.* **Berger.** [1891] I. Q. B. 597.

Landlord and tenant—Lease—Rent for quarter in arrear for 21 days—Proviso for re-entry—Distress for 3 quarters—Rent for more than one quarter still due—Lessors' right to re-enter.

A lease of house contained a proviso for re-entry "if and whenever any one quarter's rent should be in arrear for twenty-one days," &c. There being three quarters' rent in arrear the lessor distrained and after sale of the distress there remained due more than a quarter's rent. He sought for recovery of possession of the premises. *Held* that the effect of the words "and whenever" in the proviso was to give the lessor a right of re-entry as often as at any moment of time the two conditions named in the proviso existed and that the plaintiff was entitled to recover possession.

Hunt *v.* **Great Northern Railway Co.,** [1891], I. Q B. 601.

Employers and Workmen Act 1865, *S.* 10—*Railway Company—Person employed to guard and conduct train and marshal trucks—Labour mental rather than physical—No 'workman'.*

Held that a person in the employment of a Railway Company whose main duty was to guard and conduct the train and marshal the trucks, did not fall within the term 'workman" as defined in S. 10 of the Employers and Workmen Act 1865, his labour being more mental than physical, by reason of the fact that it was part of his duty at times to assist in coupling and uncoupling the trucks and in unloading them.

[* 425] ***Phelps, James and Co.** *v.* **Hill,** [1891,] I. Q. B., 605.

Ship in voyage— Necessity for deviation—Bona fide exercise of judgment by master.

The necessity which will justify a ship in deviating from the proper course of her voyage exists where the deviation is reasonably necessary, and in considering whether it is so, danger, distance, accommodation, expense and every other material circumstance must be taken into account, and if a competent master who is obliged to put back for repairs choose one port in preference to a nearer one in the *bona fide* exercise of his judgment for the benefit of both the ship-owner and the cargo, the Court or Jury ought not on light grounds to come to the conclusion that the deviation was unauthorized.

Steinman and Co. *v.* Angier Line. [1891] 1. Q. B. 619.

Bill of lading—Excepted risks—No liability for losses caused by thieves—Thefts by men employed in ships service.

A bill of lading excepted liability in respect of losses caused by pirates, robbers or thieves of whatever kind, whether on board or not or by land or sea. The goods were stolen after shipment by men employed in the service of the ship. *Held* that the exception did not cover thefts committed by persons in the service of the ship and that the defendants, were therefore liable for the non-delivery of the goods.

In re **Louis**: *Ex parte* **Incorporated Law Society.** [1891] 1 Q. B. 649.

6 & 7 Vic., Ch. 73, S. 2—*Solicitor employing process-server—Latter settling affidavits of non-service—Not acting as solicitor.*

A person employed by a solicitor as a process server who settles affidavits of non-service for persons in his employment does not, by so doing, act as a solicitor within S. 2 of 6 & 7 Vic., Ch. 73.

Witt *v.* Witt. [1891] P. 163.

Divorce—Husband's adultery and cruelty—Decree for dissolution—Custody given to wife of child—Jurisdiction of Court to rescind—Custody of child transferred to father—Wife's maintenance—No reduction.

Where on the wife's petition a decree for dissolution of marriage, by reason of the husband's adultery and cruelty, has been made and the custody of a girl of eleven years, the issue of the marriage, given to the petitioner,

the Court had power on proof that she was no longer fit to have the custody of the daughter, to rescind the order. The Court accordingly transferred the girl to the father who had again married and was shewn to be leading a respectable life, but refused to reduce the wife's permanent maintenance as the original order did not shew that it was not fixed for the mother alone.

[*422] ***In the Goods of Streatley.** [1891] P. 172.

Will—Attestation—Signature opposite to amendments—Wills Act, S. 8.

The attesting witnesses to a will signed their names in the margin of the 1st and 2nd sheets opposite to certain amendments. *Held*, on proof that the witnesses signed with the intention of attesting the testator's signature, that this was a valid attestation within the meaning of S. 8 of the Wills Act. [*Roberts* v. *Phillips*[1] followed].

Askew v. Askew. [1891] P. 174.

General administration, grant of—Proceeding for probate of will contested—Limited grant.

Where a grant of general administration had been ordered to a person, pending a litigation as to the due execution of a will, for probate of which he had applied, the grant might be limited to certain amounts then to be recovered as the administrator found difficulty in geting sureties for the whole amount.

The Rialto. [1891] P. 175.

Agreement for salvage services in the high seas—Parties not on equal terms—Sum exorbitant—Setting aside.

The fact that the parties to an agreement for salvage services about to be performed on the high seas have not contracted on equal terms will not, of itself, invalidate such an agreement, but if, in addition, the sum insisted upon by the intending salvor is, in the opinion of the Court, exorbitant, the agreement would be liable to be set aside as inequitable.

[*425] ***Beauclerk v. Beauclerk.** [1891] P. 189.

Application for divorce by wife—Wife living separate—Husband telling wife of his infidelity and preference of other women —No cruelty—Delay unreasonable.

1. (1855) 4 E. & B. 450.

A wife applied for divorce in 1890. She had lived separate from her husband under a separation deed since 1870. She now charged him with cruelty during the period between 1861 and 1870 and adultery in 1889. The nature of the cruelty alleged was that he had been keeping successive mistresses for many years and told his wife of his infidelities and of his preference for other women to her. There was evidence that the wife's health was delicate, and that the husband's conduct had to his knowledge, impaired it. Her only explanation for the delay was that she desired to consult the wishes of her son (born in 1866) after he attained age. *Butt* J. *held* that the husband's conduct did not amount to cruelty.

Held by the Court of Appeal that the wife's delay in taking proceedings was so unreasonable that the Court, in the exercise of its discretion, must refuse to decree dissolution.

*** Bethune *v.* Bethune.** [1891] P. 205. [*426]

Divorce, suit for—Systematic neglect and insult—Cruelty.

The wife sued for divorce on the ground of adultery and cruelty. To make out cruelty, facts were alleged which tended to shew systematic neglect and insult. They were that the husband refused to allow his wife to occupy the same room with him or to go out with him, that he was frequently absent and refused to account for his absences, that he told her he hated her presence, frequently used violent language and threatened to leave her if she did not do so as he wished and that her health rapidly failed which her medical attendants explained as due to the husband's conduct and the consequent mental distress and anxiety. The suit was not defended. *Held*, following *Kelly* v. *Kelly*,[1] that the husband's conduct constituted legal cruelty.

O'Shea *v.* Wood. [1891] P. 237.

Will—Inspection—Documents in possession of plaintiff's solicitor—Property of solicitor—Administrator pendente-lite.

The defendant, in an action by the plaintiff propounding a will, applied for inspection of documents in the possession of the plaintiff's solicitor who had them as his own property in his capacity of solicitor to the deceased testatrix for many years.

1. (1872) L. R. 2 P. & D. 31.

Held that as they were the private property of the solicitor, the plaintiff could not be compelled to produce them and further that no order could be made directing the administrator *pendente lite* to inspect the papers and take copies of them for the defendant.

In the goods of Sir J. E. Boehm. [1891] P. 247.

Will—Mistake of conveyancer—Draft not read over—Probate of will.

A testator in giving instructions for the preparation of his will directed £20,000 to be given to each of his daughters Georgiana and Florence. The conveyancer by inadvertence inserted the name of Georgiana in both clauses relating to the gifts to the two daughters, omitting the name of Florence altogether. The testator did not know the error and the draft was not read over to him. *Held* that probate might be granted omitting the name of Georgiana in the second clause of gift, even if the effect of such rejection might be to render ambiguous or even insensible a clause of which the word formed a part.

In the goods of Barker. [1891] P. 251.

Executor—Absent in foreign country—General power of attorney—Right of agents to apply for probate.

An executor who was absent from the country and expected to be absent for two years had, before departure, executed a general power of attorney enabling persons named in it to act for him about all his concerns or business of every kind as fully and effectually as he himself could do, and to appear for him in any Court of Justice in any action or proceeding to which he might be a party. *Held* that the power justified the Court in making a grant with the will annexed, to the parties named in it, for the use and the benefit of the executor.

In the goods of Seaman. [1891] P. 253.

Properties in England and Canada—Two separate wills—Probate of English will only—Affidavit exhibiting copy of Canadian will filed.

A testator possessed of property in England and Canada made two wills, each purporting to be independent of the other and disposing only of the estate situated in the country to which

it referred. *Held* that probate might be granted of the English will on an affidavit being filed exhibiting a copy of the Canadian will and a statement that such affidavit had been filed being indorsed on the probate, but that an affidavit must be made that the moveable chattels bequeathed by each will were actually, at the time of the death of the testator, in the country to which the will which disposed of them referred.

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* ENGLISH LAW REPORTS FOR [1890].—(*Concluded*). [* 427]

The decision in *Sanitary Commissioners of Gibraltar* v. *Orfila*[1] is of importance to municipal and other bodies which carry on administration in regard to sanitary and other matters in accordance with powers conferred by statute. The point which arose for decision was this—how far the sanitary body in question was responsible to the plaintiff for injury to his property, arising by the fall of an over-hanging road, consequent on the giving way of its retaining wall, which the corporation was under a statutory duty to maintain and repair for the safety of passengers and ordinary traffic. It was found as a matter of fact, that the wall gave way owing to original defects in its structure, that the road and the retaining wall were not constructed by the sanitary commissioners, but were in existence from a period beyond human memory, that neither the sanitary body nor its officials knew or believed that the foundation of the retaining wall was insecure, and that they were not guilty of being negligently ignorant of its defects. The Privy Council held on these facts that the body was not liable to the plaintiff for the damage sustained by him, and decreed that his suit should be dismissed with costs. It apparently rests its decision on two grounds. The first is that on a proper construction of the orders and regulations by which the sanitary board was created, it appeared that the Government, in so far as the maintenance of the retaining walls was concerned, remained in reality the principal, the Commissioners being merely a body through whom its administration could be conveniently carried on, and they were not a corporate body entirely independent of Government and Government control, and therefore it could not have been the intention of the Crown, in giving the sanitary body administrative powers subject

1. (1889) 15 A. C. 400.

to the control of the governor, to impose upon it any liability[1] [* 428] * which did not exist before, in respect of original defects in the structure of the retaining wall which supported the road in question. The second is that, assuming that the Commissioners would have been liable in respect of their failure to strengthen the foundations of the wall on its being proved that they were negligently ignorant of its defects, there was no evidence of such negligence to go to the jury. Their lordships distinguish this case from the case of *Mersey Docks* v. *Gibbs*[2], in regard to both these points. In the Mersey Docks case the trustees of the docks formed a corporate body entirely independent of Government and of Government control and differing in a material respect from a private enterprise authorized by statute law, in the fact that its undertakings and profits were held by trustees in the public interest and not for the benefit of private corporators. The House of Lords held that it did not make any difference in liability that the corporators did not receive the tolls for their personal use and benefit. Their liability was coextensive with that imposed by the general law on the owners of similar works, except in so far as the legislature by express enactment or necessary intendment specially enacted in regard to their liability. It was found as a matter of fact that the trustees, knowing that the dock and its entrance were, by reason of accumulations of mud, unfit to be used by ships, did not take due and reasonable, or any, care to put it in a fit state, but negligently suffered the dock to remain in such unfit state, whilst, as they knew well, it was used by vessels, and that the damage arose in consequence. The general principle of law is that in the case of mere nonfeasance on the part of such trustees no claim for reparation will lie except at the instance of a person who can shew that the statute or ordinance under which they act, imposed upon the Commissioners, a duty towards himself which they negligently failed to perform. In the Mersey Docks case, the trustees owed to all shippers and ship-owners using the docks and paying tolls for the accomodation, the statutory duty of keeping the docks and their entrances in a safe condition. As both these elements

[1. See upon this point *Shivabhajan Durgaprasad* v. *Secretary of State for India* (1904) I. L. R. 28 B. 314 and cf. *Haji Ismail Sait* v. *Trustees of the Harbour, Madras*: (1900) I. L. R., 23 M., 389 :—ED.]

2. (1866) L. R., 1. H. L. 93.

were wanting in the Privy Council case, their Lordships rightly held that the corporation was not liable to the plaintiff for the damage sustained by him.

* * * * * *

*Is an occupier of land under any duty to his neighbour to periodically cut the thistles naturally growing on his land, so as to prevent them from seeding, and if owing to his neglect to cut them, the seeds are blown on to his neighbour's land and do damage, is he liable? This question is answered in the negative in *Giles* v. *Walker* [1]. The County Court Judge, before whom the case came on for trial, left to the jury the question whether the defendant in not cutting the thistles had been guilty of negligence. The jury found that he was negligent and judgment was accordingly entered for the plaintiff. On appeal it was contended that the facts of the case did not establish any cause of action. On behalf of the plaintiff it was contended that the case resembled that of *Crowhurst* v. *Amersham Burial Board* [2], where the defendants were held responsible for allowing the branches of their yew trees to grow over their boundary, whereby a horse of the plaintiff being placed at pasture on the adjoining field ate some of the yew twigs and died. The Court held that there could be no duty as between adjoining occupiers to cut the thistles which are the natural growth of the soil. There can be no doubt as to the correctness of the decision. In the case relied upon by the plaintiff, it was found that the yew trees were planted and grown with the knowledge of the defendants, so as to make them responsible for whatever might be the direct consequence of the original planting, and also that the plaintiff who let loose his horse to pasture was not guilty of any such negligence on his part as would disentitle him to recover. The Court held, following the decision in *Fletcher* v. *Rylands* [3], that the defendants were liable. The principle laid down in that case was that the person, who for his own purposes brings on his land and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. What a man does may be perfectly lawful, yet if any [*429]

1. (1890) 24 Q. B. D. 656.
2. (1878) 4 Ex. D. 5.
3. (1868) L. R. 1 Ex. 265 ; L. R. 3. H. L. 330.

damage thereby befalls another he shall be answerable, if he could have avoided it, as in the case of *Lambert* v. *Bessy*.[1] Where the defendant cut thorns from a hedge adjoining plaintiff's land and the thorns fell on plaintiff's land and thereby plaintiff sustained damage, defendant was held liable to plain-
[* 430] tiff. This principle has of course, * no application to the case in question where the product was the growth of nature.

* * * * * *

The decision in *Filburn* v. *People's Palace and Aquarium Company*[2] holds that an elephant comes under the category of animals *ferae nature*, and therefore that the plaintiff who sustained personal injuries from an elephant, which was exhibited by the defendants, was entitled to recover damages from them, though they were not aware that the elephant was dangerous. The Master of the Rolls states: 'It cannot possibly be said that an elephant comes within the class of animals known to be harmless by nature or within that shown by experience to be harmless in this country and consequently it falls within the class of animals that a man keeps at his peril and which he must prevent from doing injury under any circumstances, unless the person to whom the injury is done brings it on himself.' Lord Justice *Lindley* says: 'We have had no case cited to us, nor any evidence to show, that elephants in this country are not as a class dangerous; nor are they commonly known here to belong to the class of domesticated animals.' Lord Justice *Bowen* says: 'The broad principle that governs this case is that laid down in *Fletcher* v. *Rylands*[3].' The question admits of argument, how far this decision is applicable to India, where elephants are so largely tamed and employed for various purposes. The guarded language used by the learned Judges shows that they were strictly confining themselves to the law of England and not enunciating one of those broad propositions applicable more or less to all parts of the British Empire. It will also be remembered that the Indian Court and the Privy Council, while accepting the principle laid down in *Fletcher* v. *Rylands*,[3] differed from the English Court as to the application of the principle in regard to the artificial storing of water on one's land, the former holding, that it is the most natural user of land

1. (1680) Sir T. Raymond, p. 421.
2. (1890) 25 Q. B. D. 258.
3. (1868) L. R. 1 Ex. 265.

in an agricultural country like India subject to terrible drought, and the latter, that it was a non-natural user of land in England where as Mr. Justice *Holloway* says, until the summer of 1860 it never entered into the head of any Englishman that the storing up of large quantities of water could be essential to agriculture. (*Madras Railway Co.* v. *Zamindar of Karvat naggur* [1].) We shall not therefore be surprised if the Indian *Courts hold that a tame elephant in India does not come under [* 431] the category of animals *ferae nature*.

* * * *

The decision in *The Queen* v. *Whitchurch*[2] raises a very interesting question of law. A woman believed herself to be with child, though in fact she was not with child, and conspired with other persons to administer drugs to herself and to use instruments on herself with intent to procure abortion. In pursuance of the conspiracy the others administered to her noxious drugs and used or caused to be used upon her instruments. All of them were convicted of conspiracy to procure abortion under S, 58, Ch. 100, of 24 and 25 Vict. The said section runs as follows: 'Every woman being with child who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever with intent to procure the miscarriage of any woman whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony.' Under this section it is evident, the woman could not have been convicted of unlawfully administering to herself any poison or other noxious thing as she was not with child, in which case only the act becomes an offence, and yet she was convicted for conspiring with others to do a thing which it was perfectly competent for her to do without coming under the clutches of the law[3]. The Lord Chief Justice admitted that the words of the section would not apply, if the indictment had been for an attempt to

1. (1871) 6 M. H. C. 180 affirmed by P. C. in (1874) 4 B. L. R. 29.

2. (1890) 24 Q.B.D. 420.

[3. Under Ss. 312, 313, 315 and 316 of the Indian Penal Code the woman herself may also be guilty of the offences under those sections in addition to other persons but if she was not with child she may be guilty of attempt or of abetment;—Ed.]

procure abortion ; but he had no doubt that the woman was rightly convicted of the offence of conspiracy, that is a combination to commit a felony. The reason for convicting the woman is put neatly by Mr. Justice *Hawkins*. He says : 'It is clear that she could not lawfully call in other persons to do that which when done by them is a crime punishable with penal servitude. What she did was a conspiracy to commit a criminal act.' It will be noted that for committing the offence of conspiracy it is not necessary that one should intend to do the act, which all the parties to the conspiracy are prohibited from committing. It is [* 432] enough * if any one of them is prohibited from committing that act. We do not believe that persons combining to do an act, which not one of the parties so combining is prohibited by law from doing, can be convicted of conspiracy, though the unguarded language used by some judges would lead one to suppose that there are cases in which by the mere act of combining to do an act, persons can be guilty of conspiracy, though in the absence of such combination not one of the persons so combining can be convicted of any offence. For instance, Lord Justice *Bowen* says in *Mogul Steamship Company* v. *McGregor Gow* & *Co.*[1]: 'Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise and the very fact of the combination may show that the object is simply to do harm and not to exercise one's own just rights'. We would respectfully submit that the true reason for conviction in such cases is the second one assigned by the learned judge, that a malicious motive can be more easily gathered, where a number of persons act in concert, than when each acts by himself. As Sir Fredrick Pollock puts it, 'the conspiracy or confederation is not the gist of the action, but is only matter of inducement or evidence. Another point to be remembered in cases of conspiracy is the distinction between an illegal act and an act the validity of which the law will not recognize. A contract without consideration may not be recognized by law, but it is not an illegal act. It is unfortunate that the Master of the

1. (1889) 23 Q. B. D. 598 at p. 616 affirmed in [1892] A. C. 25.

Rolls ignored this distinction in his dissenting judgment in the *Mogul steamship case.*[1]"

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The effect of a pardon granted by the Queen under her Sign Manual is discussed in *Hay* v. *Justices of Tower Division of London*[2]. S. 14 of 33 & 34, Vict. Ch. 29, enacts that, 'every person convicted of felony shall for ever be disqualified from selling spirits by retail and no license to sell spirits by retail shall be granted to any person who shall have been so convicted as aforesaid.' Upon an application for a license to sell spirits by retail, it appeared that the applicant had been convicted *of felony, but had received a free pardon under the Royal [* 433]
Sign Manual. The question arose whether the pardon had the effect of purging the applicant of the crime and infamy. The Court held that by the prerogative of the Crown the pardon extended far beyond the discharge of the prisoner. It was a purging of the offence. As one text writer puts it 'the 'effect of a pardon like that of the allowance of clergy is not 'merely to prevent the infliction of the punishment denounced 'by the sentence, but to give to the defendant a new capacity, 'credit, and character.' The same view was taken in the case of *Cuddington* v. *Wilkins.*[3] The plaintiff in that suit brought an action against the defendant for calling him a thief. The defendant justified. The plaintiff pleaded a general pardon, and on demurrer it was adjudged for the plaintiff, for the whole Court were of opinion that though he were a thief once, yet when the pardon came, it took away not only *pœnam* but *reatum*, for felony is *contra coronam et dignitatem Regis.*' In India the Governor-General in Council and the Local Governments possess merely the power of remitting the whole or any portion of the punishment to which any person is sentenced. It is the Sovereign alone who has the prerogative of pardoning an offender.

* * * *

In what cases objections to jurisdiction may be waived is discussed in *Moore* v. *Gamgee*[4]. The plaintiff commenced an

1. (1889) 23 Q. B. D. 598 at p 616 affirmed in [1892] A. C. 25.
2. (1890) 24 Q. B. D. 561.
3. (1615) I Hob. 67, 81; 80 E. R. 216.
4. (1890) 25 Q. B. D. 244. [See *The Manager of the Court of Wards, Kalahasti Estate* v. *Ramasami Reddi*, (1905) I.L.R. 28 M. 437, as to waiver where there is an illegal order of remand; per *Strachey* J. in *Chandulal Khushalji* v. *Amad Bin Umar Sultan* (1896) I.L.R. 21 B. 351 as to waiver of an objection as to insufficiency of consent under S. 433, C.P.C.:—ED.]

action against the defendant in a County Court, within the district of which the defendant had carried on business, within six months before the commencement of the action, but did not dwell or carry on business at the time of commencing the action. Leave to sue in that Court had not been obtained. The County Courts Act (1888) enacts that leave of the Judge or Registrar must be obtained for instituting a suit in a Court within the district of which the defendant or one of the defendants dwelt or carried on business at any time, within six calendar months next before the time of suit. The defendant appeared and the case was heard and partly determined and adjourned to a future day. At the second hearing the defendant for the first time objected to the jurisdiction of the Court. The Court held that the objection to the jurisdiction was one which could be waived, and that the
[* 434] defendant had waived it. Mr. Justice *Cave** says: 'There are 'two senses in which it may be said that there is no jurisdiction 'to entertain an action—first, where under no circumstances can 'the Court entertain the particular kind of action as in cases 'within S. 56 of the Act—that is, libel, slander, seduction, or 'breach of promise of marriage; secondly, there are the cases 'provided for by S. 74, where under certain circumstances leave 'can be given to bring an action which the Court could not 'otherwise entertain; in these cases there is no want of jurisdic-'tion over the subject-matter of the action, but leave is required 'in the particular cases before the Court can entertain the 'action.' He held that in the latter class of cases the objection to jurisdiction might be waived. This distinction was recognized and acted upon by the Privy Council in the cases of *Ledgard* v. *Bull*[1] and *Minakshi* v. *Subramanya*[2].

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Macdougall v. *Knight*[3] decides that a person who brings an action for libel, relying on certain defamatory statements in a pamphlet, and gets a decision, cannot bring a second suit relying upon other defamatory statements contained in other portions of the pamphlet. The Court rests its decision on the ground that the matter is *res judicata* and that the course adopted by the plaintiff was an abuse of the process of the Court, and the action should therefore be stayed. The Court also reiterates the

1. (1886) L.R. 13 I.A. 134 s.c. I.L.R. 9 A. 191.
2. (1887) L.R. 14 I.A. 170 s.c. I.L.R. 11 M. 26.
3. (1890) 25 Q.B.D. 1.

proposition of law which it had clearly enunciated in the earlier case of *Macdougall* v. *Knight*[1] that the publication, without malice of an accurate report of what has been said or done in a judicial proceeding in a Court of Justice, is a privileged publication, although what is said or done would but for the privilege be libellous against an individual and actionable at his suit, and this is true although what is published purports to be, and is, a report not of the whole judicial proceeding but only of a separate part of it, if the report of that part is an accurate report thereof and published without malice. It is doubtful if Indian Courts possess this power of staying an action on the ground that it is an abuse of the process of the Court. [But such power is inherent in every Court. See *Haggard* v. *Pelicier Freres*[2] followed in *Vijiasamy Tevar* v. *Sasivarma*[3] :—ED.] In *Lawrance* v. *Norreys*,[4] Lord Justice *Cotton* says: 'The jurisdiction 'of the Court to prevent its process being abused and to prevent 'actions being brought, which are mere vexation, is original and 'does not depend* upon the general orders of the Court. The [* 435] 'jurisdiction is recognized by the House of Lords in *Metropolitan* '*Bank* v. *Pooley*.[5]' In the House of Lords the Lord Chancellor says: 'It cannot be doubted that the Court has an inherent 'jurisdiction to dismiss an action which is an abuse of the pro'cess of the Court.' Whether in spite of the absence of any provision in the Codes relating to procedure in India, the Indian Courts possess this inherent jurisdiction possessed by English Courts is a point which remains still unsettled and we are not aware of any case in which the existence of the jurisdiction is stated in the broad way in which it is laid down in the decisions quoted above. [But see *Vijiasami* v. *Sasivarma*[3] :—ED.]

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The case of *Vadala* v. *Lawes*[6] lays down, following *Abouloff* v. *Oppenheimer*[7], that when an action is brought in England to enforce a foreign judgment, the defendant may raise the defence that the judgment was obtained by the fraud of the plaintiff, even though the fraud alleged is such that it cannot be proved without re-trying the questions adjudicated upon by the foreign

1. (1886) 17 Q.B.D. 636.
2. (1892) A.C. 61 at pp. 67 and 68.
3. (1905) I.L.R. 28 M. 560.
4. (1890) 39 Ch. D. 213 and 15 A.C. 210.
5. (1885) 10 A. C. 210. [See also *Haggard* v. *Pelicier Freres*: (1892) A. C. 61 ED.]
6. (1890) 25 Q. B. D., 310.
7. (1883) 10 Q. B. D. 295.

Court. As both the decisions are decisions of the Court of Appeal we may take it that the question is finally settled by high authority. [The Madras High Court has in a recent case followed the case of *Vadala* v. *Lawes*[1] and held that a judgment might be set aside for fraud and that perjury of witnesses would be such fraud as would entitle a party to maintain a suit for setting aside the judgment or decree. See *Venkatappa* v. *Subba*[2] :—ED.]

PRESUMPTION OF TITLE FROM POSSESSION.

We propose to consider the limits of the presumption of title arising from possession of immovable property. The rule of evidence on the subject is neatly embodied in S. 110 of the Indian Evidence Act which runs as follows :—"When the question is "whether any person is owner of anything of which he is shewn to "be in possession, the burden of proving that he is not the owner "is on the person who affirms that he is not the owner." Simple and elementary as this rule of law may appear to be, and in reality is, it is simply surprising what an amount of confusion there exists in the application of this principle both in English and Indian cases, especially the latter. The presumption is, of course, met by the very same presumption arising by proof of prior possession in another. Title to property being derivative, the very principle of law on which the above presumption is founded produces this result, *viz.*, the presumption arising from an earlier
[*436] possession prevails* against that arising from a later possession. The defendant may also, of course, meet the presumption of title arising in favour of the plaintiff by proving that in fact the defendant is the owner of the property. If the defendant establishes that the title to the property was in him prior to the plaintiff's possession, the presumption of title in favour of the plaintiff at once disappears, and the plaintiff can then succeed only by proof of adverse possession for a period which would give him title by prescription or by proof of assignment to him by operation of law, or by act of parties, of the defendant's title.

The English cases on the question of mere possession being *prima facie* evidence of title, will be found collected, and referred to, in the following Text books :—

1. "Roscoe's Digest," 15th Edition, pages 910 and 245.

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1. (1890) 25 Q. B. D. 310. 2. (1905) I. L. R. 29 M. 179.

2. Taylor on Evidence, 8th Edition, Ss. 123, 125, 126.

3. Possession in the Common Law by Pollock and Wright, Chapter III.

Though the weight of the presumption may depend upon the duration and length of possession, yet the presumption, as a presumption of law, is the same whether the possession was for one day or more. In several cases the rule is ennunciated as a rule of substantive law that possession is a sufficient proof of title as against a wrong-doer. This is not quite accurate in cases in which the defendant, though a wrong-doer, may set up *jus tertii* (*viz.*, right of a third person) in answer to the plaintiff's claim in ejectment[1]. The rule is nothing more than a rule of evidence which shifts the burden of proof or disproof of ownership as the case may be. If a plaintiff by mere proof of prior possession succeeds in ejecting the defendant, it is simply because the presumption of ownership arising from the fact of possession is not rebutted, and not because the defendant is a wrong-doer and does not establish a title in himself. This seems to be the rule most in accordance with the principle of English law, that a plaintiff in an action of ejectment must succeed on the strength of his own title, and not on the weakness of the defendant's title, and is also conformable to most of the English decisions. Mr. Pollock, however, in his treatise above referred to, limits the operation of this rule to cases in which the defendant, a wrong-doer, defends the suit on behalf of a third party, the true owner, and holds *that he cannot defeat the plaintiff's suit by setting up the *jus tertii* of the true owner, when he has not his sanction or authority to defend the suit on his behalf. This view is probably in accordance with the tendency of some modern decisions relied upon by Mr. Pollock, and may ultimately prevail on the ground that possession is a mode of acquisition of title by prescription, sanctioned by law, and that, therefore, possession should be recognized as a transferable and divisible interest, which should be protected as against those who intrude upon such possession, and who, in defending the suit brought by the person dispossessed, are not in a position to rely upon the authority or sanction of [* 437]

1. [A question may arise whether a person who has obtained possession wrongfully or by fraud can set up a plea of *jus tertii* as against a prior possessor from whom he obtained possession fraudulently. Cf. *Hodson* v. *Walker* : (1872) L. R. 7 Ex. 55, and *Shi Gopal* v. *Aisha* : (1906) I. L. R. 29 A. 52 (Per *Knox* J.) :—ED.]

the true owner, or it may be, of the person who had possession prior to that of the plaintiff. We shall, however, reserve the consideration of this question for a future occasion.

The principal English decisions bearing on the main question will now be noticed. The principle of the decision in *Brest* v. *Lever*[1] when examined, simply amounts to this, *viz*., an earlier presumption must prevail until a better title is shown. In *Doe D. Harding v. Cooke*[2] the same principle was laid down as in the preceding case. The plaintiff proved 20 years' possession, and the defendant 10 years' possession following the twenty. It was held that the plaintiff was entitled to recover. In *Doe dem Carter* v. *Barnard*[3], *Patterson*, J. in delivering the judgment of the Court, observed as follows:—"These cases would have warrant-" ed us in saying that the lessor of the plaintiff had established " her case, if she had shewn nothing but her own possession for " 13 years. The ground, however, of so saying would not be that " possession alone is sufficient in ejectment (as it is in trespass) to "maintain the action, but that such possession is *prima facie* " evidence of title, and no other interest appearing in proof, evi-" dence of seisin-in-fee. Here, however, the lessor of the plaintiff " did more, for she proved the possession of her husband before " her for 18 years, which was *prima facie* evidence of his seisin-in-" fee; and as he died in possession, and left children, it was *prima* "*facie* evidence of the title of his heir, against which the pos-" session of the plaintiff's lessor for 13 years could not prevail, " and therefore she has, by her own shewing, proved the title to " be in another of which the defendant is entitled to take advan-
[*438] " tage. On this ground we think that the* rule for a nonsuit " must be made absolute." This case affords a very good illustration of the application of the principle, and the principle itself is enunciated with clearness. In *Asher* v. *Whitlock*[4], *Cockburn* C. J. said : "But I take it as clearly established that possession " is good against all the world except the person who can shew " a good title, and it would be mischievous to change this estab-" lished doctrine. In *Doe* v. *Dyeball*[5] one year's possession by the " plaintiff was held good against a person who came and turned " him out, and there are other authorities to the same effect."

1. (1841) 7 M. &. W. 593.
2. (1831) 7 Bing. 346.
3. (1849) 13 Q. B. 945 (953).
4. (1865) L. R. 1 Q. B. 1 at p. 6,
5. (1829) 3 C. & P. 610.

Mellor, J. observed:—"The fact of possession is *prima facie* "evidence of seisin-in-fee. The law gives credit to possession "unless explained, and Mr. Merewether, in order to succeed "ought to have gone on and shewn the testators's title to be bad "as that he was only tenant-at-will, but this he did not do." In *Allen* v. *Rivington* [1], the plaintiff established priority of possession, and defendant established no title in himself. Judgment was given for the plaintiff. In *Davison* v. *Gent* [2], *Bramwell*, B. observed: "The party who has turned the plaintiff out of pos- "session is sued. The plaintiffs only fail to shew that they "have a title under a particular person. It is not for the defend- "ant then to ask it to be presumed that he has any title or right "to recover. It is for him to prove that he has title in answer to "the plaintiff's proof of a prior possession. I am therefore "clearly of opinion that the plaintiffs are entitled to recover." *Danford* v. *McAnulty* [3] may also be referred to.

In applying this principle in India no small amount of perplexity has been caused by S. 15 of Act XIV of 1859 corresponding at present to S. 9 of the Specific Relief Act I of 1877. The provision enacted by that section is that if a person be dispossessed otherwise than in due course of law, he shall be entitled summarily to recover back possession irrespective of the question of title, provided he brings his suit within six months from the date of his dispossession. Probably there is no such provision in English law. This provision does not in the least affect the operation of the rule of evidence in question, though strangely enough it has perplexed the minds of several Indian Judges. The effect of this peculiar provision of the Indian law is that the plaintiff can recover in ejectment, notwithstanding that *the defendant may conclusively establish his title to, and right to [* 439] the present possession of, the land, if the plaintiff is dispossessed otherwise than in due course of law, and he seeks this remedy by a summary suit brought within six months [4]. The decree in

1. (1845) 2 Wins Saunder's Reports, p. 111.
2. (1857) 26 L. J. N S. (Ex.) 122 at pp. 125, 126.
3. (1881) 6 Q. B D. 645.

[4. But if he has not brought a suit under S. 9 but claims on title although the suit is within 6 months, he cannot recover on mere possession without reference to title. Courts ought not to treat a suit partly as a suit under S. 9 of the Specific Relief Act and partly as a suit on title. See *Ramasami Chetti* v. *Paraman Chetti* (1901) I L. R. 25 M 448 dissenting from *Ram Harakh Rai* v. *Sheodi hal Joti* (1893) I.L.R. 15 A. 284 :—ED.]

such a suit will only restore the plaintiff to the possession of the land, and will be no bar to a regular suit being brought by the defendant on the strength of his title to eject the plaintiff.[1] If the person dispossessed has no recourse to this summary remedy, but brings a suit after the expiration of six months, he must recover on the strength of his title, and not on the simple ground that he was dispossessed by the defendant otherwise than in due course of law. If he proves his possession, the onus of disproving his ownership will lie on the defendant, and if he fails in disproving the plaintiff's title, the plaintiff will be entitled to a decree on the strength of his title. But if the defendant establishes his own title either by proof of his possession prior to that of the plaintiff or otherwise, the defendant will succeed; but this the defendant will not be at liberty to do in a suit brought against him under S. 9 of the Specific Relief Act.

The following are the Indian decisions in which the principle has been correctly laid down and applied.

In *Khajah Enaetoollah Chowdhry* v. *Kishen Soondur Surma*[2] the question is considered with reference to S. 15 of Act XIV of 1859 as well as English decisions and Privy Council rulings, and the conclusions arrived at are fairly correct. In *Brojo Sunder Gossami* v. *Kailash Chunder Kur*,[3] the plaintiff established only 11 years' possession prior to his dispossession by the defendant, and the defendant failed to establish any title in himself. Judgment was given for the plaintiff. *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti*,[4] is a Full Bench decision of the Bombay High Court, and is probably the best Indian decision on the question now under consideration. It was there held that possession constitutes an interest requiring affirmative proof of a superior title on the part of any one who seeks to disturb it, and therefore where a person in possession of property which has been sold in execution as being the property of another, sues to establish his title to such property, the burden of proof lies not upon

[1. *Narayana Rau* v. *Dharmachar* (1902) I. L. R. 26 M. 514. Cf. *Sheo Kumar* v. *Narain Das* (1902) I. L. R. 24 A 501. The P. C. decision in *Rangayya Goundan* v. *Nanjappa Goundan* (1901) I. L. R. 24 M. 491; s. c. L. R. 28 I. A. 221 must not be treated as deciding this point adversely although the former suit was only one for possession under S. 9 of the Specific Relief Act as the exact nature of the former suit is not adverted to by their Lordships.—ED.]

2. (1867) 8 W. R. C. R. 386.

3. (1882) 11 C. L. R. 133.

4. (1882) I. L. R, 6 B. 215.

him, but upon the person who claims as purchaser at the execution sale. In *Ayesha Beebee* v. **Kanhye Mollah* [1] it was held [* 440] that possession is evidence of title, and if a plaintiff proves that he had possession, and that that possession has been forcibly dis turbed by the defendant, he makes out a *prima facie* title, which it is for the defendant to rebut. In *Trilochun Ghose* v. *Koylashnath Bhuttacharjee*, [2] the same principle was substantially affirm ed. In *Doe dem Kullammal* v. *Kuppu Pillai*, [3] the principle of English law as to possession being presumptive evidence of title was recognized at page 89. In *Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar*, [4] it was held that the plaintiff, although suing more than six months after the date of dispossession, and without resorting to a possessory suit, (Act XIV of 1859, S. 15; Act I of 1877, S. 9), was entitled to rely on the possession previous to his dispossession, as against a person who had no title. In *Mohabeer Pershad Singh* v. *Mohabeer Singh*, [5] *Garth* C.J., recognised the principle of English law, and observed as follows:—

"I think that in a case of this kind, where the plaintiff is dispossessed by a person who is found to have no title and to be a trespasser, it is sufficient for the plaintiff to prove that he was in quiet possession at the time when he was so dispossessed. It seems to me that this ought to be sufficient to establish a *prima facie* case as against the defendant. I am aware that there is some difference of opinion in the Courts upon this point, and that some learned judges consider that the remedy by a possessory action which is now provided by S. 9 of the Specific Relief Act, and which was formerly given by the Limitation Act, has the effect of doing away with the English rule, that possession is *prima facie* evidence of title. I do not see why that should be. The rule seems to me a very wise and convenient one, and I should be sorry to see it abolished. I think, therefore, that the Court below is right, and the appeal should be dismissed with costs."

In *Biressur Banerjee* v. *Onooda Churn Banerjee* [6] the same principle is affirmed and applied very clearly.

It is unnecessary to cite additional cases in support of such a simple and elementary proposition of law which, however, is not clearly perceived when it has to be applied to concrete cases except by clear-headed judges. Most of the contrary Indian decisions on *the point will now be noticed. It may be stated at the outset [* 441] that these decisions are chiefly based on a misapprehension of the effect of the dicision of the Privy Council in the case of *Wise*

1. (1869) 12 W. R. C. R. 146.
2. (1869) 12 W. R. C. R. 175.
3. (1862) 1. M. H. C. 85.
4. (1884) I.L.R. 8 B. 371.
5. (1881) I.L.R. 7 C. 591.
6. (1865) 3 W.R. C. R. 12 (2nd column).

v. *Amirunnissa Khatoon*[1]. In that case their Lordships of the Privy Council observed as follows:—" It is quite clear that the "plaintiffs have failed to make out a title. The defendants were "put into possession by the Government, who were entitled to "the lands, and they were ordered by the Magistrate under the "Code of Criminal Procedure to be retained in possession. If "the plaintiffs had wished to contend that the defendants had "been wrongfully put into possession and that the plaintiffs "were entitled to recover on the strength of their previous pos-"session without entering into a question of title at all, they "ought to have brought their action within six months under "S. 15 of Act XIV of 1859; but they did not do so." It is quite clear from this extract that all that their Lordships of the Privy Council there lay down is that, if a plaintiff wants to recover simply on the strength of his former possession, notwithstanding that the defendant establishes a title in himself, he ought to have brought a suit within six months under S. 9 of the Specific Relief Act [2]. They state that the ownership of the land was in Government, and that Government made a grant of it to the defendant. The presumption of title in favour of the plaintiff, arising from the fact of his possession, had been rebutted by proof of title in the defendant, and therefore, the plaintiff's suit was rightly dismissed. How this *dictum* of the Privy Council can be construed as a ruling that the principle of English law, embodied in S. 110 of the Indian Evidence Act, is inapplicable to India, surpasses one's comprehension; yet in two cases, *Debi Churn Boido* v. *Issur Chunder Manjee* [3] and *Ertaza Hossein* v. *Bany Mistry* [4] it was so held. These two cases hold that the plaintiff, whose prior possession is established, cannot succeed in ejecting the defendant who has established no title in himself, or in a third party, unless the prior possession of the plaintiff was of a duration sufficient to give him a title by prescription. It is quite clear that this proceeds on a thorough misapprehension of the ruling of the Privy Council in *Wise* v. *Amirunnissa Khatoon* [1] and of the effect of the summary and specific remedy given by S. 9 of the Specific Relief Act which in no way

1. (1879) L. R. 7 I. A. 73 at p 80.

[2. See *Wali Ahmed* v. *Ajudhia* (1891) I. L. R. 13 A 537 :—ED.]

3. (1882) I. L. R. 9 C 39.

4. (1882) I. L. R. 9 C. 130.

conflicts with or limits the operation of S. 110 of the Indian Evidence Act.

[At the time of this article there were good grounds for saying that the law upon the point under consideration was in a confused state owing to the hopeless conflict of decisions in the Indian Courts. But since then we are justified in stating that the law is more settled. In Madras for some time S. 9 of the Specific Relief Act was held to affect the rule of English Law that a plaintiff might sue and recover on his possessory title though the suit was not and could not be based under the Specific Relief Act. The first note of dissent was made after the advent of Sir *S. Subrahmanya Aiyar* to the High Court Bench. See *Mustapha Saheb* v. *Santha Pillai*[1]. The other Judge, Mr. Justice *O'Farrell*, in dissenting from this view, was only echoing the old view which he was submitting to as a District Judge himself. The question was elaborately discussed by Sir V. *Bhashyam Aiyangar* J. in *Narayana Row* v. *Dharmachar*[2] and it was held, dissenting from *Nisa Chand Gaiter* v. *Kanchiram*[3], that possession was, under the Indian Law as under the English Law, a good title against all but the true owner and that S. 9 did not affect the principle that prior possession of the plaintiff was a sufficient title as against a wrong-doer who would not defeat the suit by setting up *jus tertii*. Ever since we may take it that this is the settled view in Madras. The same view is taken by the Allahabad High Court. In *Wali Ahmad* v. *Ajudhya*[4] two Judges of the Allahabad High Court held that S. 9 of the Specific Relief Act does not affect the principle that a plaintiff may recover on the strength of his possessory title even though the suit may be brought after six months. In the same case, however, Mr. Justice *Mahmood* dissented from this view. It has also been held that possession is ordinarily presumptive proof of title,[5] that possessory title is good against all except the true owner, and that such title is heritable, *i.e.*, is capable of being disposed of by deed or will or by execution sale. [6] The Bombay Court has been throughout

1. (1899) I. L. R. 23 M. 179 at pp. 182, 183. 2. (1902) I. L. R. 26 M. 514.
3. (1899) I. L. R. 26 C. 579. 4. (1891) I. L. R. 13 A. 537.
5. *Bhikhi Rai* v. *Udit Narain Singh* (1903) I. L. R. 25 A. 366 (370); *Pahlwan Singh* v. *Ram Bharose* (1904) I. L. R. 27 A. 169.
6. *Gobind Prasad* v. *Mohan Lal* (1901) I. L.R. 24 A 157; *Pahlwan Singh* v. *Ram Bharose, supra*; *Shi Gopal* v. *Aisha* (1906) I. L. R. 29 A 52.

consistent. The Full Bench case of *Pemraj* v. *Narayan*,[1] referred to in this article, applied the principle enunciated as regards the English Law in *Asher* v. *Whitlock*[2]. It has been followed recently in *Hanmantrao* v. *The Secretary of State for India.*[3] See also *Bait Faran* v. *Somad Asla* [4].

In Calcutta, however, the decisions were conflicting. In *Nisa Chand Gaiter* v. *Kanchiram* [5] it was held, dissenting from the previous decisions, that mere previous possession short of the statutory period would not entitle the plaintiff to a decree for recovery of possession in a suit brought more than six months after dispossession. For a further discussion, see the Article in the October Number, *i. e.* 1 M. L. J. pp. 561—569.—ED.]

[* 442] *PARASARA MADHAVIYAM.

Translator's Note.—Madhava introduces the subject of marriage in his commentary to the Parasara Smriti, though Parasara himself does not allude to it. Madhava says:—"Though it would be proper to treat in this Smriti, as is done in other Smritis, the rules relating to the various orders after laying down the rules relating to the various castes, yet the Acharya (Parasara) left them out as he was not questioned on the subject by Vyasa. But we shall propound them for the benefit of our hearers."

NOW OF MARRIAGE.

Here Manu says:—* "Let a twice-born man, permitted by his *Guru*, having bathed and returned (from studentship) according to rule, marry a wife of the same caste, having good marks." Also *Yajnavalkya* :†—"Let a man who has maintained Brahmacharya inviolate, marry a woman, having good marks (1), who, has not previously been another's, (2) is lovely, (3) is an *Asapinda* (4) is (his) junior, is free from disease, has a brother or brothers, and is born of persons whose *Arsha* and *Gotra* are not the same (as his own)."

(1) "**Having good marks,**" *i.e.*, possessing good qualities, both external and internal. The external qualities have

* III. 4. † I. 53.

1. (1882) I. L. R. 6 B. 215
2. (1865) L. R. 1 Q. B. 1.
3. (1900) I. L.R. 25 B. 287.
4. (1901) 3 Bom L. R. 246.
5. (1899) I.L.R. 26 C. 579.

been set out by Manu :—* "Let him marry a woman not deformed, with a pleasing name, who walks like a swan or an elephant, and who has thin hair, locks, and teeth, and the parts of whose body are soft." The same (authority) states who are to be avoided †:—" Let him not marry a tawny (कपिल) maiden, nor one with superfluous parts (of the body), nor one afflicted with disease, nor one without hair'[1] or with excessive ‡ hair, nor one garrulous, nor one who is yellowish, nor one named after a star, tree or river, nor one named after low caste people or a mountain, nor one named after a bird, snake, or servant, nor one with a terrifying name." "Tawny", [2] *i.e.*, of the color of red rice; "red[3], *i.e.*, of the color of fire; "of low caste", *i.e.*, named after *mlechas.* Also in *Vishnu Purana* §:—

"Let not a wise man marry a woman, who is marked with hair in the face, nor one who has a masculine appearance, nor one with a grating voice, nor one who is emaciated, nor one who has the voice of a crow, nor one whose sight is unsteady, nor one who has likewise *round eyes, nor should he marry one whose [* 443] legs are overgrown with hair, or one whose ankles are projecting, or one whose cheeks have dimples during laughter. Nor should a wise man marry one whose beauty is very rough, or one whose nails are pale, or one whose eyes are red, or one with small hands and feet.|| Nor should a man marry one who is a dwarf, or one who is very tall, one whose eyebrows meet each other, or one who has teeth with too much space between them, or one with a fearful face."

The internal qualities, however, are stated in *Asvalayana's Grihya* ¶ to be difficult to be known.

"Let him take eight balls of earth and having consecrated them with the mantra :—' in the beginning right first came into existence : in right is truth established ; for what (destiny) this

* III. 10. † III. 8 and 9.

‡ *i.e.*, in parts of the body where it should not be.

§ Vishnu Purana III .Ch. 10, Sl. 18 to 22.

|| We have followed the reading of the Calcutta Edition by the Asiatic Society, The Telugu Edition omits a few lines up to 'feet.' Another reading is आपीन which means "stout or fat."

¶ I Cff. 5 Sut. 4 to 6. See Translation S. B. E. Vol. 2. p. 165.

1. In the body

2. Kulluka explains this as having tawny locks of hair.

3. Kulluka explains it as one having yellowish eyes.

girl is born, that may she attain here and what is true may that be seen'; let him address the maiden (thus): 'take one of these.' If she take (the one) from a field yielding two crops, one should know[1] her offspring will be rich in food; if (the one) from a cow-pen, rich in cattle; if the one from the remnants of the earth of the alter, endowed wiih spiritual sanctity; if (the one) from a pond never dry, rich in everything; if the one from a gambling place, addicted to gambling, if the one from a place, where four roads meet, going astray[2], if the one from a barren soil unlucky and if the one from the burning ground, she will destroy her husband." विप्रव्राजिनी means wandering very much in different directions. The meaning is 'unchaste.'

(2) **"Who has not previously been another's"** *i.e.*, who has not been appropriated by any other man by gift, or enjoyment By this a re-married woman (*Punarbhu*) is hereby excluded. Hence *Kasyapa* says:—" Seven *Punarbhu* maidens (constituting) the worst of the lineage should be avoided; one given by word of mouth, one given mentally one 'to whom the ceremony of tying the marriage thread has been performed (on the wrist), one who has been given away with water, one who has been taken by the hand, one who has walked round the fire, and one who is born of a *punarbhu.** These, thus mentioned by *Kasyapa*, consume the family like fire.

Baudhayana:—"*Punarbhus* are of seven kinds, one given by word of mouth, one given mentally, one who has walked round the fire, one who has been taken to the seventh step, one who has been co-habited with, one that is *enciente*, and one who has been delivered of a child. By taking her, one obtains neither issue nor religious merit."

Also *Narada*:—† "She who is still a maiden and has not lost her virginity, but who has been defiled by having been taken by the hand, [3] is called the first kind of *Punarbhu* if she is married a second time.

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* Visahna Purana III Ch. 10th Prakarana V. 18 to 22.

† Sacred Books of the East; Vol. XXXIII, p. 174, Sl. 46.

1. Naravana Explains it by saying she will have plenty.

2- Another reading is व्राजिनी i. e., going "astray".

3. Of the bridegroom in marriage.

Also *Yajnavalkya* **:—"*Punarbhu* is one whose (marriage) *Samskara* is again performed, whether she had lost her virginity or not."

(3) "**Is lovely**", *i. e.*, amiable, *i. e.*, pleasing to the mind and the eye of the person marrying. Hence *Apastamba* says:—"(His) prosperity (lies) in her who arrests (his) mind and eyes."

(4) "**Is an Asapinda**":—She who has the same, *i.e.*, (one) *pinda* is a *sapinda*. *Asapinda*, *i.e.*, not a *sapinda*—(he shall marry an *asapinda*). And sapindaship ends with the seventh generation. Of them, one is the giver of the *pinda*, and three—father, grandfather, and great grandfather—are the recipients of the *pinda*; and three beginning with the great-great-grandfather, are the recipients of *lepa* (wipings.) So also, in *Matsya Purana*[1]:—Those beginning with the fourth generation are the recipients of *lepa* and those beginning with the father are recipients of *pinda*; the giver of *pinda* to those is the seventh, and (thus) sapindaship extends over seven generations.

Also *Markandeya*[2]:—"Father, grandfather, and great-grandfather, these three persons should be understood to be connected by *pinda*,[3] and the other three persons beginning with the paternal grandfather's paternal grandfather are connnected by *lepa* and the person who offers (*pinda*) to them is the seventh. This is the relationship extending over seven generations declared by sages." It amounts to saying thus:—The connection of seven persons [4] in the same *pinda* offering is the cause of sapinda relationship. For example sapinda relationship (exists) between Devadatta and the six persons of his own family beginning with (his) father, and similarly with *six (generations) beginning with (his) son. But, if so, there would be no sapindaship with a brother, a paternal uncle and others, they not being included among those specified. Not so: for what was intended to be spoken about was the sameness of the ceremony by reason of the identity of the divinity intended. Some one among those who participate as divinities in the offerings made by Devadatta may also participate in offerings [* 445]

** Ch I, 67.

1. Ch. XVIII, Verse 29.
2. Ch. XXXI, Verses 3 to 5.
3. Participators in pinda.
4. Generations.

made by (Devadatta's) brother, paternal uncle, and others: and thus (Devadatta) has *sapinda* relationship with them (his brother, paternal uncle and others). And similarly for (their) wives sapindaship arises by reason of their joining in the ceremony of the offering of pinda made by their husbands. This is what is (known as) sapindaship through offerings.

But others describe sapindaship differently.[1] Thus those who have the same, *i. e.*, one *pinda*, *i. e.*, member of body, are *sapindas*. In that matter sapinda relationship exists between the father and his son by reason of the (son's) direct connection with the particles of the father's body; similarly with his paternal grandfather and others, by reason of the connection with particles of their body through the father. Similarly with the mother by reason of the son's direct connection with the particles of the body of the mother. Likewise with his maternal grandfather and others by reason of the connection with the particles of their body through the mother. And so even with his paternal uncle, father's sister and others, by reason of his connection with the particles of the body of the paternal grandfather; so also with his mother's sister, maternal uncle and others, by reason of his connection with the body of the maternal grandfather. Similarly he is a *sapinda* of his wife, by reason of their being the originators of the same body. And so (*sapindaship* exists) even with (one's) brother's wives, they being the originators of the same body in conjunction with their respective husbands who originated from the same body. Thus, in the respective cases, sapindaship should be determined from connection with the same body either immediately or mediately.

She who has not this sapindaship of the kinds described (above) is an *asapinda*, and such a one should be married. But, if this be so, marriage can nowhere take place, for in all cases, as it will be possible to bring in *sapinda* relationship somehow, and as it will be impossible to avoid continuous connection with the Creator's body. As it is said in the *Sruti*[2]: "May I be many:
[* 446] may I procreate." This is no defect. For the **sapinda* relationship which would attach generally has been restricted to seven

1 The Telugu Edition has 'corporeal' instead.

2. Sacred Books of the East, Vol. XV, Part 2, p. 58, 6th Anuvaka. Chandogya Upanishad VI, ii, 3. Taitriya II, vi, 1.

and five generations, and ceases to exist beyond that. Thus *Gautama* says: "Cessation of sapindaship is at the seventh or the fifth (generation).* Also *Yajnavalkya*†—"Beyond the fifth and the seventh from the mother and the father (respectively)." This should be construed by adding the words 'sapindaship ceases,' thus :—Beyond the fifth generation on the mother's side, and the seventh generation on the father's side, (sapindaship ceases.) For Manu says:‡ "Sapindaship ceases at the seventh generation." It means : The marriage of a bride or bridegroom who is beyond the seventh generation on the father's side, counting from the ancestor, his son and so on; so also where on the mother's side, on counting from the common ancestor, his son and so on, the mother of the bride or bridegroom is the fifth; then the marriage of those whose sapindaship has thus ceased is not wrong. As to the text of *Vishnu Purana* §—"O king! let a house-holder according to the lawful rule marry a maiden who is the fifth on the mother's side and the seventh on the father's," the words 'beyond the fifth and the seventh' should be supplied. For, otherwise, it would be contrary to the text[1] "beyond the fifth and the seventh" and to the following text of *Marichi*:—"They to whom (who go through) the ceremony of marriage in the fifth and the seventh (generations) is done, these persons, though devoted to the ceremonial law, become for all purposes Sudras." Though *Paitinasi* has mentioned two (alternative) courses—"Five (generations) from the mother should be avoided, and seven from the father, or three from the mother, and five from the father": of these, the second alternative applies to cases of marriage between different castes. For *Sankha* says : "If several persons are born of one (man), but of different ¶ women, (they) are of different classes, have one *pinda*, but are of different degrees of purity, but the *pinda* ceases with three generations." The meaning is this :—Persons who have the same father but are born of mothers belonging to different classes, are themselves of different classes, owing to the difference (of caste) of the mothers. Although this may be so inasmuch as there exists the identity of the father, sapindaship

* Ch. XIV, Verse 13.
† Ch. I, Sl. 64.
‡ Ch. 5, Sl. 60.
§ III. 11. Ch. Sl. 23.

¶ *i.e.*, belonging to different castes.

1. Yâjnavalkya, Ch. I, verse 53.

[* 447] exists between them. *Such sapindaship ceases after the lapse of three generations. But if this be so, sapindaship would cease with three generations also on the father's side, and it would conflict with the text ' or five from the father.' It is so. However the text of *Paitinasi*: " three from the mother or five from the father " is intended to forbid marriage within nearer degrees only between persons of the same class. Or let it be an alternative course.

In (the text)[1] " on the side of the mother and on the side of the father" the word ' father,' comprehends also the procreator. Thus *Gautama* says[2] :—" Beyond the seventh from the father's *bandhus* and the procreator's, and the fifth from the mother's *bandhus*." He who begets a son by *niyoga* (appointment) is the procreator. Father's and mother's *bandhavas* are mentioned in another *Smriti* :—" Father's father's sister's sons, father's mother's sister's sons, and father's maternal uncle's sons are to be known as the father's *bandhavas*." " Mother's father's sister's sons, mother's mother's sister's sons, and mother's maternal uncle's sons are to be known as the mother's *bandhavas*." But should not the word *asapinda* have been omitted, as the passage to be stated hereafter—" born of persons whose *arsha* and *gotra* are not the same (as his own) " [3]—is itself sufficient to forbid the marriage of a *sapinda* (maiden) ? True : still this is said in order to indicate that she alone, who is an *asapinda* of (his) mother, is commendable for the purpose of marriage. And so (says) Manu[4]—" One who is not the mother's *sapinda* or father's *sagotra*, she is commendable for conjugal marriage among the twice-born." One who is not the mother's *sapinda* and *sagotra* and is not the father's *sagotra* or by the force of the word " cha," is not a *sapinda* (this meaning being arrived at) by force of the word '*cha*' is commendable, *i.e.*, fit to be married for the twice-born, for purposes of conjugal marriage, *i.e.*, marriage by the union of man and woman.

But is not the use of the word ' mother ' in this (text meaningless ? For by the prohibition of the father's *sagotras*

1. Yajnavalkya, Ch. I. v. 53.

2. The Telugu Edition here inserts " at nearer degrees."

3. Sacred Books of the East, Vol. I, Ch. 4, p. 194.

4. Ch. III. § 5.

and *sapindas* the prohibition of the mother's *sagotras* and *sapindas* is attained inasmuch as she (the mother) has no separate *pinda* and *gotra* according to the text :—" A *woman becomes [* 448] one with her husband in *pinda*, *gotra*, and *sutaka* (pollution); so she loses her (father's) *gotra* on marriage at the seventh step." This is not so. For in the *Gandharva* and other forms of marriage as there is no gift of the maiden, the *gotra* and *pinda* of the father do not cease. And so in *Markandeya Purana* [1]—" The funeral cake and water should be offered, as belonging to the husband's *gotra*, in the case of a maiden married in the forms beginning with the *Brahma*, and as belonging to (her) father's *gotra* in the case of one married in the forms beginning with the *Gandharva* by one acquainted with the ceremonial law."

C.C.

CRITICAL NOTES.

Chidambaram Pillai *v.* Sabapathi Pillai.—1 M. L. J. 218.—*Disclaimer by a tenant in answer to a suit to eject.* In this case Mr. Justice *Wilkinson*, sitting as a single Judge, decided that although a tenant from year to year cannot ordinarily be ejected without a determination of the tenancy by reasonable notice to quit, the rule does not apply where the tenant, in answer to the landlord's suit, repudiates the tenancy, and denies title of the landlord. His Lordship held that " the circumstance that it was denied for the first time in the written statement is immaterial." The correctness of the decision seems to us to be open to great doubt. It is elementary law that a landlord cannot sue for recovery until the tenancy has come to an end. Where the tenancy is from year to year, it may be terminated by the landlord giving the tenant reasonable notice to quit ; see Cl. (*h*) S. 111, T. P. Act, or by the tenant renouncing his character as such by setting up a title in a third person or by claiming title in himself, *i.e.*, by what is called in English law a ' disclaimer ' on the part of the tenant. It is, however, necessary in the latter case, for the determination of the tenancy, that the landlord should evince his intention to determine the lease ; see Cl. (*g*) S. 111, T. P. Act. It is therefore clear that where there is disclaimer, notice to quit is unnecessary, as

1. Ch. II. 26, Verses 21, 22.

the disclaimer itself may be treated by the landlord as determining the lease. But where the tenant does not deny his title, the landlord can terminate the lease only by notice. This has been decided to be the Indian law, apart from the T. P. Act in numerous cases. It will be enough for our purpose to refer to *Abdulla Rawutan* and others v. *Subbarayyar*[1] and the Full Bench decision in *Rajendronath Mookhopadhya* v. *Bassider Ruhman*
[* 449] *Khondkhar*[2] * in support of the statement. It follows then that there is no legal determination of the tenancy, and therefore no title to sue, where notice to quit has not been given. It is a necessary link in the title of the landlord to recover, and no disclaimer by the tenant in his written statement can cure the want of title in the plaintiff at the date of suit. Mr. Justice *Wilkinson* relied on two cases in support of his view—*Mayavanjari Chumaren* v. *Ninimi Mayuran*[3] and *Gopalrao Ganesh* v. *Kishor Kalidas*.[4] In the former case there was no question as to notice, but it was held that a Kanom tenant in Malabar, who is ordinarily entitled to hold for 12 years, forfeits his right by contending in a suit to eject him that the land does not belong to his landlord. The case of *Gopalrao Ganesh* v. *Kishor Kalidas*[4] no doubt supports Mr. Justice *Wilkinson's* view; there *Sargent* C. J. observed, "as the defendant has throughout denied the plaintiff's title, the plaintiff would be under no obligation to prove notice, supposing it to be established that defendant was his tenant." The denial appears to have been made really only in the defence to the suit. His Lordship refers in support of his decision to *Vivian* v. *Moat*;[5] *Doe d. Trustees of the Bedford Charity* v. *Payne*;[6] and to Woodfall's *Landlord and Tenant*, 11th Ed., p. 325; but neither of these two cases, nor the passage referred to in Woodfall, supports the learned Chief Justice's view. In both the English cases, the disclaimer took place before the suit, and the passage in Woodfall has no reference to cases where the tenancy has not determined at the date of suit. It is indeed doubtful whether his Lordship had in view the difference between a disclaimer before suit and a disclaimer in defence to the suit. As the English authorities referred to are cited also in *Baba* v.

1. (1878) I. L. R. 2 M. 346.
2. (1876) I. L. R. 2 C. 146.
3. (1864) 2 M. H. C. R. 109.
4. (1885) I. L. R. 9 B. 527.
5. (1880) 16 Ch. D. 730.
6. (1845) 7 Q. B. 287.

Vishwanath Joshi,[1] by *West* J., we may at once state that in reality there is no English authority whatever in support of this view; see Woodfall's *Landlord and Tenant*, pp. 376 to 378. *Baba* v. *Vishwanath Joshi* [2] was decided by *West* and *N. Haridas*, JJ. The plaintiff sued to eject the defendant, who, he alleged, was a tenant from year to year. The defendant set up a permanent tenancy, which he failed to prove. It was then contended for the defendant that he could not be ejected, as the tenancy had not been determined by notice to quit. *West* J. overruled the contention and observed: " When the defendant did not admit a yearly tenancy, he could not claim the notice due only to a yearly tenant * * * The land being, as between a landlord and tenant, the landlord's property, he has a right to possession, except so far as the tenant makes out a right in derogation of that." It is difficult to see how the plaintiff as landlord could sue to eject the tenant, without terminating the tenancy by notice. Surely the defendant was entitled to retain possession till then, and it was not for him to *prove a right in derogation of the landlord's [* 450] right. His setting up a permanent tenancy could not give the plaintiff a cause of action which he had not when he instituted the suit. But possibly the decision was based not on the ground that the tenant's disclaimer in the suit cured the want of notice to quit, but on the fact that the defendant had failed to prove what the learned judge held he was bound to prove. This was the view taken of the decision by the Calcutta High Court in *Prannath Shaha* v. *Madhu Khulu*. [3] *Agarchand Gumanchand* v. *Rakhma Hanmant*,[4] is to the same effect as *Baba* v. *Vishwanath Joshi* [2] and *Gopalrao* v. *Kishor Kalidas* [5] though the point does not appear to have been considered there.

In Madras, the question was discussed in *Subba* v. *Nagappa* [6] by *Parker* and *Shephard* JJ., who refused to follow the Bombay view and pointed out that it was not really supported by the case of *Vivian* v. *Moat*[7], on which the Bombay decisions were apparently chiefly based; see also *Paidal Kidavu* v. *Parakal Imbichuni Kidavu*.[8] *Wilkinson* J. distinguished *Subba* v. *Nagappa*[6] on the ground that there the title

1. (1883) I.L.R 8 B 228.
2. (1883) I. L. R. 8 B. 228.
3. (1886) I. L. R. 13 C. 96.
4. (1888) I. L. R. 12 B. 678 (at p 682).
5. (1885) I. L. R. 9 B. 527.
6. (1884) I. L. R. 12 M. 354.
7. (1880) 16 Ch. D. 730.
8. (1862) I. M. H C. R. 13.

of the landlord to *some* rent was admitted, the defendant's contention being that they were permanent tenants, and that there was really no disclaimer in consequence. This is opposed to the decision in *Vivian* v. *Moat*[1] where *Fry* L. J., held that an assertion of a permanent tenancy by a yearly tenant is a disclaimer which will justify the landlord in suing to recover possession. Moreover, there can be no doubt that the *ratio decidendi* in *Subba* v. *Nagappa*[2] was that a disclaimer in the course of the suit cannot be relied on by the landlord in answer to an objection that there was no notice to quit.

The Calcutta Court adopted the same view in *Prannath Shaha* v. *Madhu Khulu*,[3] and *Kali Krishna Tagore* v. *Golam Ally*.[4] It is somewhat surprising that so much confusion should arise on a matter, which appears after all to be very elementary. The question is merely, if the plaintiff, when he sues, has no cause of action, can he be permitted to say that the disclaimer of the defendant in his answer has furnished him a cause of action? Can he be permitted to recover, when at the date of suit he had no title to recover? There can be no doubt that the answer should be in the negative. We cannot help entertaining a suspicion that a notion that notice to quit is merely an equity in the tenant's favour, and not necessary to perfect the landlord's cause of action, has to some extent contributed to the confusion on the subject.

[For the cases bearing upon this question see the note at the end of the report 1 M. L. J. 24/218 :—ED.]

Sriram Samanta *v.* Kalidas Dey.—I.L.R. 18 C. 316. —*Suit for mesne profits—Jurisdiction of Small Cause Courts.*
[* 451] In this case the *construction of Cl. 31 of the Second Schedule of the Provincial Small Cause Courts Act (IX of 1887) was in question. The clause exempts "any other suit for an account, &c., including a suit for the profits of immovable property belonging to the plaintiff, which have been wrongfully received by the defendant," from the cognizance of the Small Cause Court. Now, the proper construction of this clause is of importance, to determine not only whether *a certain

1. (1880) 16 Ch. D. 730.
2. (1884) I.L.R. 12 M. 354.
3. (1886) I. L. R. 13 C. 96.
4. (1886) I. L. R. 13 C. 248.

class of suits is cognizable by Small Cause Courts, but also whether there is a right of second appeal in suits of that nature below Rs. 500 in value, instituted in the regular Courts (*vide* S. 586, C. P. C.). The Calcutta High Court holds that suits for *mesne* profits fall within the clause, and are not therefore within the jurisdiction of Small Cause Courts. The Judges (*Norris* and *Beverley*, JJ.) follow an earlier case, *Krishna Prosad Nag* v. *Maizuddin Biswas*[1], decided by *Tottenham* and *Ameer Ali*, JJ., and adopt the distinction therein suggested between suits for *mesne* profits and suits for damages for wrongfully cutting and carrying away crops. It is stated that, where there is a *bona fide* claim of right to the land on the part of the defendant, suits for *mesne* profits are not within the jurisdiction of the Small Cause Court, and that where there is no such claim and only a wrongful appropriation of the profits, the Small Cause Court can take cognizance. It is difficult to see what foundation there is for this distinction in the words of the clause. Wherever *profits* are *wrongfully received* by the defendant from the plaintiff's land, whether under a claim of right or not, suits for the recovery of the profits are outside the jurisdiction of the Court. If a stranger has been in possession of any land as a mere trespasser, and profits have been received by him, has he not wrongfully received the profits within the meaning of the clause? The clause in question supposes that a suit for those profits is allied to a suit for an account. But neither clause 30 nor the words "any other suit for an account" in clause 31 suggests a *bona fide* claim of right on the part of the defendant as a ground for exclusion from the jurisdiction of the Small Cause Court. Whether or not these words suggest some pre-existing relation between the plaintiff and defendant as that between co-owners or between principal and agent, or ward and guardian, there is nothing in them about a "*bona fide* claim of right."

Now what is the meaning of the clause? Suits for *mesne* profits are suits for damages, and as such they were held in spite of some doubt to the contrary to be within the cognizance of Small Cause Courts under S. 6 of Act XI of 1865; see *Ram Pearee Debia* v. *Dinonath Mookerjee*[2]; *Kakaji Sakharam* v.

1. (1890) I.L.R. 17 C. 707.
2. (1868) 10. W.R. 375.

[* 452] *Govind Ganesh* [1]; * *Darma Ayyan* v. *Rajapa Ayyan* [2]; and *Sungram Singh* v. *Juggun Singh*[3], and the remark of *Tottenham* and *Ameer Ali* JJ. in *Krishna Prosad Nag* v. *Maizuddin Biswas*[4] that the last case has not been followed, does not appear to be correct. Clause 31 of the 2nd Schedule of the new Act seems clearly to make a departure. Suits for profit wrongfully received by the defendant are designedly exempted, as the Select Committee of the Legislative Council say in their report on the Bill as amended by them before it became Act IX of 1887. We conceive that the words "profits" and "received" suggest an action for *mesne* profits and possession of the property actual or constructive by the defendant when the profits accrued. An action for *mesne* profits, says Wharton in his law lexicon, is an action of trespass brought to recover profits derived from land whilst the possession of it has been improperly withheld. When there is a mere carrying off of the crops and no possession of the land by the defendant, the suit is not for *mesne profits received* but one for compensation for trespass or for recovery of specific movable property. The Articles of the Limitation Act illustrate this distinction. Arts. 39 and 49 suggest one class of cases while Art. 109 is in the same terms as the portion of clause 31 we are considering. We think it would not be appropriate to style a suit for damages for trespass or wrongful conversion of crops, a suit for profits received. The case of *Makhan Lall Datta* v. *Goribullah Sardar*, [5] which was for damages for use and occupation of land and for use of a portion of the earth by the defendant, may be supported on the ground that the land yielded no profits and none were received by the defendant. Possession of the plaintiff's immovable property by the defendant and receipt of profits accruing upon the land are necessary elements to determine whether an action for the profits falls within clause 31.

[The decision in the case under notice has been overruled by a Full Bench of the Calcutta Court in a more recent case —*Kunjo Behary Singh* v. *Madhub Chandra*.[6] For a discussion upon this question in the light of recent cases and for the view

1. (1871) 8 B.H.C.R. A.C. 96.
2. (1879) I.L.R. 2 M. 181.
3. (1870) 2 N.W.P. 18.
4. (1890) I.L.R. 17 C. 767.
5. (1890) I.L.R. 17 C. 541.
6. (1896) I.L.R. 23 C. 884.

held in the different High Courts see note on the same case in the Notes of Indian Cases I M. L. J. 493.—Ed.]

JOTTINGS AND CUTTINGS.

**Posting of Cases in the High Court.*—The system of posting [* 454] cases for hearing in the Madras High Court has become a source of great trouble to the practitioners and parties. No case is heard on the date fixed for hearing in the notice to the respondent. All cases are then adjourned *sine die.* When the necessary papers have been printed and are ready to be sold to the parties, each case is posted in what is called a ready list to be taken up for hearing on any date subsequent to the date therein named, *i. e.*, frequently months after that date. Whenever the case may happen to be taken up thereafter notice of it can only be had the previous evening. Sometimes it also happens that the case posted in the ready list is taken up the very next day for hearing. The inconvenience of this arrangement is manifest. A practitioner cannot be expected any more than the judge to prepare his case immediately after it is posted in the ready list. He has possibly a hundred of his cases so posted and it is unreasonable to expect him to tax his memory, with the facts of each case against the day of hearing which may be months thereafter. The expense and trouble to parties who have to come sometimes long distances to Madras and stay there for weeks in vain expectation of their cases coming on, is unhappily very great. And to their sad disappointment, immediately after their return, their cases are heard and disposed of, without the opportunity for them to instruct their counsel or vakil for the hearing. We have often known instances of parties who have come to Madras, several times in expectation of the hearing, returning disappointed or being compelled to be absent when their presence was needed. This state of work in the High Court has caused a large amount of dissatisfaction to parties and practitioners. * We think more than 1,500 cases [* 455] were posted on the ready list just before the 13th July, when the High Court reopened. The number of parties who have been put to the expense of a visit to and stay in Madras on that account is necessarily large, not a tenth of whom, however,

could expect their business to be disposed of within a reasonable time of their arrival. Sometimes heavy cases, with a printed record of from 500 to 1,000 pages and involving, it may be, knotty questions of fact and law are posted at the short notice of one night in which the practitioner, possibly without instructions owing to his client's absence, is expected to be ready to argue them. During the weeks following the 13th of July last, it came to our notice that two or three such cases were posted in that manner. This state of things calls for a speedy remedy.

We have, moreover, reason to doubt whether the system adopted by the High Court is in accordance with law. S. 156, C. P. C., lays down that when a Court adjourns the hearing of the suit, it "shall fix a day for the further hearing of the suit." S. 157 which deals with the default of the parties refers to "the day to which the hearing of the suit is adjourned." These sections show that it is obligatory on the Original Court to adjourn the hearing, whenever adjournment may be necessary, to a fixed date. Now the same procedure applies *mutatis mutandis* to the High Court as a Court of First or Second Appeal, *vide* Ss. 582 and 587. S. 552 says that the Appellate Court, except in the case mentioned, "shall fix a day for hearing the appeal." S. 555 provides that "on the day so fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard, &c." Now Ss. 156 and 555, together, indicate that a suit or appeal should be adjourned only to a fixed date. If the adjournment is not so made, the parties cannot be charged with default, nor can the procedure prescribed on default have any application. There seems also to be authority in support of the construction we have suggested. In *Jeebun Monee Dossee* v. *Tarinee Churn Ghose*,[1] *Trevor* and *Campbell* JJ. said: "This case was appointed by the Judge to be heard on the 20th September. It was not taken upon the appointed day, nor at any time before the holidays, nor was any fresh appointment made, but on the 23rd November the Judge took up the case and finding the appellant not present, struck it off. This procedure is illegal. The Judge is *bound to keep to the time appointed, or to adjourn the case from time to time to*

1 3 W. R. Act x. 164.

some fixed date. It may be that when a case is on the board for hearing on a particular day and the Court is regularly going down that board, it is well understood that cases not reached on one day are adjourned to the next day without a separate order in each case, and the parties are no doubt bound under such circumstances to attend *de die in diem* till their cases are reached. But where there is considerable delay or any interruption of the continuous hearing of the daily cause list for other business, then a new date should be fixed."

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A juror giving evidence.—At the recent Bedford Assizes, a prisoner on his trial for rape, after giving evidence himself in denial of the charge, *under the Criminal Law Amendment Act 1885, proposed to call one of the jurors as a witness to his character. Mr. Justice *Williams* declined to allow the juror to be sworn, but said that he might give his fellow-jurors the benefit of his knowledge in deliberating on the verdict, and this having been done, the jury acquitted the prisoner. We have much doubt whether the practice pursued was in accordance with precedent. It appears to be a settled rule (see BEST on *Evidence*, 7th Ed., p. 193) that a juryman may be a witness for either of the parties to a cause which he is trying, and 'it is essential that this should be, as otherwise persons in possession of valuable evidence would be excluded if placed on the jury panel, and might even be fraudulently placed there for the purpose of excluding their testimony.' It is said, too, (see STARKIE on *Evidence*, 3rd Ed., p. 542), that if a juror know any facts material to the issue, he ought to be sworn as a witness, and if he privately state such facts, it will be ground of motion for a new trial. The rule was applied to a criminal trial in *Regina* v. *Rosser*[1]; and though we can find no instance of its being applied to a witness merely to character, we cannot but think that it ought to be applied to such a witness, on the ground that the test of cross-examination cannot be properly employed to testimony privately given in the jury-box. It is true, no doubt, that witnesses to character are seldom cross-examined, but their liability to cross-examination is undoubted. Moreover, if evidence as to character be given privately in [* 456]

1. (1836) 7 C. & P. 648.

the jury-box, there will not be the same facility for the prosecution, under 6 & 7, William IV., Ch. 3, giving evidence, if they should happen to possess it, that the prisoner has been previously convicted of felony.—*The Law Journal.*

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The Sovereign as a Witness.—In the *Berkeley Peerage Case,*[1] so it is said in 'TAYLOR on *Evidence,* 8th Ed.,Vol. II. p. 1175,' in reference, no doubt, to the case heard at the beginning of the present century, 'counsel entertained some idea of calling the Prince Regent as a witness, but it ultimately became unnecessary to do so.' in the *Berkeley Peerage Case*[2] which is now being heard before the Privileges Committee of the House of Lords, a letter signed by George IV was held inadmissible, but without any direct overruling of *Abignye* v. *Clifton,*[3] in which the simple certificate of James I as to what passed in his hearing was admitted in evidence in the *lifetime* of His Majesty. *Abignye* v. *Clifton,*[3] however, is a case which has been very much questioned (see BEST on *Evidence,* 7th Ed.,p.185), and the better opinion seems to be that the evidence of the sovereign, if given at all, must be given on oath (see Taylor, citing 2 Lord Campbell's 'Lives of the Chancellors,' 510). It is, of course perfectly clear, as was pointed out by *Baron Parke* in *The Attorney General* v. *Radloff,*[4] that the sovereign cannot be compelled to give evidence, and we think it to be equally clear that the deduction of *Baron Parke* from this, to the effect that the sovereign cannot be a witness at all, was quite unsound. The fact, however, remains undoubted that in no case has the sovereign yet appeared as a witness, and that Charles I took upon
[* 457] *himself to direct the Judges of his day to leave the question of admissibility of his evidence an undetermined one in point of law.—*The Law Journal.*

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The Baccarat Case.—One of the most delightful attributes of the Bar is its readiness to acknowledge the success of its members. In this sense jealousy is unknown. It is universally admitted that the forensic skill with which the two distinguished

1. (1811) 4 Camp. 415; 14 R.R 782.
2. (1858-61) 8 H.L.C. 21.
3. (1612) Hob, 213.
4. (1854) 10 Ex, 84, 94.

leaders conducted their cases in *Cumming* v. *Wilson*,[1] has not been surpassed in modern times. *Sir Edward Clarke* previously enjoyed a reputation as an advocate only second to that of *Sir Charles Russell.* Probably, to-day, the general opinion is that the distance between them has been reduced, if not dissipated. However this may be, the Bar is always glad when a reputation is made, and equally so when a high reputation rises still higher. Singular, is it not, that the three most prominent common law leaders, *Sir Charles Russell*, *Sir Henry James* and *Sir Edward Clarke*, never graduated at any University ?—*The Law Times.*

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Lord Halsbury on the Administration of Justice.—At a banquet to the Judges at the Mansion House, in reply to the toast of "Her Majesty's Judges," the *Lord Chancellor* said:—"My *Lord Mayor*, Ladies and Gentlemen,—On behalf of my brother judges and myself, I return hearty thanks for the kindness with which yon have received this toast, and for the graceful terms in which it has been proposed. I cannot help thinking that the city of London is one of those places, wherein peculiarly resides the spirit of law and admiration for the administration of justice. Perhaps, my *Lord Mayor*, you are not aware that in an old charter—I should be sorry to be cross-examined as to its exact date—you are the Chief Justice of London. I am reminded also that *Lord Mayor Oliver* once thought it right, in order to resist the unjust infringement of the liberty of the subject, to commit two messengers of the House of Commons to prison. I have not been informed what became of the *Lord Mayor*, or of the two messengers, but the memory of that act is recorded in the loving cup which, I observe, is there for ornament, though I do not see that it is used. But to come to later times, with my own experience, and speaking in all sincerity, I think that a special jury, presided over by one of the judges in the city of London, is one of the best means of ascertaining the truth, which has ever existed in the world. It was to me a matter of great regret that the practice of administering justice in the greatest commercial city of world, in cases in which great commercial interests were involved, was discontinued, and I hope and believe that this model tribunal

1. (1903) I. L. R. 26 M. 607.

may be restored to the city of London. In speaking in the abstract of the administration of justice, one is speaking of a profession, which is perhaps a little handicapped, because litigation cannot be carried on without the sinews of war. People demand that the administration of justice should be carried on with cheapness and promptitude; and these are characteristics about which something may be said on both sides. With regard to cheapness, there is a large, useful, and learned body, who are not altogether interested in justice being cheap. I remember an old lady who
[* 458] was telling me of her *grievances against her solicitor. Her grievance was that she was occupied a whole day in pointing out to him the boundaries of his own property, and he was so dead to all sense of justice as to charge her for what she told him With reference to promptitude also, there are two sides to the question The person who is in the right wishes to have the case decided at once; but he who is in the wrong is not always so anxious that the truth should be ascertained. In respect of justice there are few people and causes, which are altogether either black or white. It is generally a matter of grey, and it is a difficult matter to determine whether the black or white predominates. As a great advocate said, the administration of justice is in the nature of harmony. It is one of those harmonies which are struck out of dissonant notes, and it is only in the end that these discordant notes tremble into a harmony of their own. Litigants are not always satisfied, if the speech of their advocates are as terse and pointed and short as your own. They like their cases to be argued at full length. But on the present occasion, I happily have clients, who are sufficiently acquainted with long speeches to desire that I should be brief on their behalf; and therefore I say in a word that we are heartily obliged to you for your kindness and hospitality. We recognize the fact that the city of London is always anxious to do honour to those who are administering justice to the best of their ability, and although the judge would be departing from the dignity of his office, if he sought to please by the particular judgment or opinion which he ventured to express, yet it must be a satisfaction to the judges, if, upon the general conduct of their duty, they succeed in winning the approval of their fellow-citizens.—*The Law Times*.

NOTES OF INDIAN CASES.

* **Binda v. Kaunsilia.**—I.L.R. 13 A. 126.—(1) The texts [* 491] of the Hindu Law constituting the relation of husband and wife create a legal right to conjugal society, and suits for restitution of conjugal rights or for recovery of wives, when the parties are Hindus, are maintainable in our Civil Conrts [1]. (2) Antecedent demand is no condition precedent, to such suits. (3) Arts. 34 and 35, Sch. II, of the Limitation Act are not applicable to the case of Hindus, as demand and refusal do not form part of the cause of action under the Hindu Law and as it is beyond the scope of the Limitation Act to affect their personal laws. (4) Art. 120, read with S. 23 of the Limitation Act, is applicable. (5) Insanity of husband cannot justify desertion by wife nor afford a plea to an action for restitution of conjugal rights [2]. (6) Even justifiable desertion does not terminate the marriage relationship under the Hindu Law. (7) Establishing a matrimonial offence [3] on the part of the plaintiff that would entitle the defendant to a judicial separation, would be a complete defence in a suit for restitution of conjugal rights. (8) Legal cruelty on the part of a complainant may be a ground for refusing restitution of conjugal rights or for imposing terms on the complainant.

[On the 3rd and 4th points there seems to be some difference of opinion in the Indian High Courts. Under the Act of 1889, it was held that refusal by one married spouse to live with the other and to allow such other to exercise conjugal rights was a continuing wrong and that a suit for the restitution of conjugal rights could not, therefore, be barred. See *Hemchand* v. *Shiv.*[4] This principle was at first applied by the Bombay Court even to cases arising under the Act of 1877. See *Bai Sari* v. *Sankla Hirachand*[5]. It was left open in the case of *Fakir Gauda* v. *Gangi*:[6] In *Dhanjibhoy Bomanji* v. *Hirabai*[7] a Full Bench of the Bombay

[1. See also on this point *Tekaitmon Mohini Jemadai* v. *Basanta Kumar Singh* : (1901) I.L.R. 28 C. 751.—ED]

[2. Impotence of defendant cannot be claimed by him as any valid defence. See *Purshotam Das* v. *Bai Mani* (1896) I.L.R. 21 B. 610.—ED.]

[3. Plaintiff's being out of caste is not a matrimonial offence and will not disentitle him to claim restitution. No condition to be inserted in decree that he should be restored to caste—*Sahadur* v. *Rajwantha* (1904) I. L. R. 27 A. 96.—ED.]

4. (1883) I.L.R. 16 B. 715 N.
5. (1892) I.L.R. 16 B. 714.
6. (1898) I.L.R. 23 B. 307.
7. (1901) I.L.R. 25 B. 644.

High Court, dissenting from the ruling of the Allahabad High Court in *Binda* v. *Kaunsilia*[1] held that a suit under the Parsi Marriage and Divorce Act (XV of 1865) by a wife for the restitution of her conjugal rights was barred by the lapse of time when restitution had been demanded by her and refused by the husband being of full age and sound mind more than two years prior to the commencement of the suit.

The reference in the case was expressly confined to the case of Parsis, so that although the remarks were general, they ought to be confined to the question referred. Nevertheless, the Madras High Court followed the Bombay ruling to a case arising among Hindus and held that a suit for the restitution of conjugal rights would be barred. See *Saravanai Perumal Pillai* v. *Poovayi*.[2] It may be noted that some misapprehension is to be found in the judgment of *Jenkins* C. J. in the Full Bench case already referred to. He seems to think that *Mahmood* J. not merely did not proceed upon the basis of the Bombay decision in *Hemchand* v. *Shiv*[3] but also altogether dissented from the therein. Reasoning. If the judgment of *Mahmood* J. is read carefully, it will not support this view. The Bombay Court in that case held that the refusal was a continuing wrong and that continuing wrongs were provided for in S.23. *Mahmood* J. says that S. 23 has application to such a case. The doubt which he raised but which he did not decide, was as to successive demands and refusals and whether such successive demands and refusals could be made a foundation for successive actions. But if the suit be to recover an ascertained sum of money as profits arising out of land it has been held that this is a distinguishing circumstance and that such suit is congnizable by a Court of Small Causes. Whether this distinction is supportable on principle need not here be considered. The Limitation Act of 1908 has apparently accepted this view of *Mahmood* J.—ED.]

Queen Empress v. Pohpi.—I. L.R. 13 A. 171.—*Held* by the Full Bench (*Mahmood* J. *dissentiente*) that when a criminal appeal has been admitted, notice given, and the records sent for and perused, the appeal may be disposed of in the absence of the
[* 492] appellant or his pleader, and he or his *pleader should be heard,

1. (1890) I.L.R. 13 A. 126. 2. (1905) I.L.R. 28 M. 436.
3. (1883) I.L.R. 16 B. 715 N.

only if present. *Per Mahmood* J.—It cannot be disposed of under the circumstances without hearing the appellant or his pleader though he need not be heard if the appeal is summarily rejected. The High Court is competent to send for a criminal to appear before it and explain a difficulty in his case.

Gobardhan Dass *v.* Jasadamoni Dassi.—I.L.R. 18 C 252.—(1) It is clear from the provisions of Act XXI of 1866, that a non-Christian marriage is not dissolved by the mere fact of the conversion of one or both of the parties to Christianity and (2) a person professing Christianity at the time of presenting the petition is entitled to a dissolution of marriage under the provisions of the Indian Divorce Act (IV of 1869), though at the time of marriage, the parties were Hindus and became converts to Christianity only after marriage. See *per contra Ref. case* 23 of 1890 (M. H. C.) and *Zuburdust Khan* v. *His wife* [1]. [See also *Thapita Peter* v. *Thapita Lakshmi* [2] where it has been held by a Full Bench of the Madras High Court that the marriages contemplated by the Act are those founded on the Christian principle of a union of one man to the exclusion of others and that consequently the Act does not contemplate relief in cases where the parties have been married under the rites of Hindu Law, a Hindu marriage not being a monogamous one. See also *Magania* v. *Prem Singh* [3]:—Ed.]

Mahamed Arif *v.* Saraswati Debya.—I. L. R. 18 C. 259.—A transfer of property by a minor is not void but voidable at his option and a contract entered into by a minor is only voidable at the option of the minor—But *vide* 1 M.L.J. 262; Rev. M. L.J. 213 [and *Mohori Bibee* v. *Dharmodas Ghose* [4]:—Ed.]

In the Matter of Ramkumari.—I.L.R. 18 C. 264.—(1) Illegitimacy under Hindu Law is no absolute disqualification for marriage, and when one or both the contracting parties are illegitimate, the marriage must be regarded as valid if they are recognized by their caste people as belonging to the same caste (2) There is no authority in Hindu Law for the position that a degraded person or an apostate is absolved from all civil obligations incurred before degradation or apostacy. So far as

1. (1870) 2 N.W.P. 370.
2. (1894) I.L.R. 17 M. 235.
3. (1906) 8 Bom. L-R. 55.
4. (1903) L.R. 30 I.A., 114 ; I.L.R 30 C 539. [This must be taken to have overruled this and other decisions of the Indian Courts :—Ed.]

the matrimonial bond is concerned, such a view would be contrary to the spirit of the Hindu Law, which regards that bond as absolutely indissoluble. (3) The rule of Mahammadan Law which declares a convert to Muhammadanism in a foreign country absolved from any matrimonial tie, upon the expiration of a certain time, without notice to his or her spouse, can have no application here, as British India is no foreign country. Mere conversion of one of the parties to Mahammadanism, does not dissolve a subsisting marriage tie, without notice to the opposite party or intervention of a Court of Justice, and as the Mahammadan Law does not allow a plurality of husbands, a second marriage by a convert woman is void, as the previous marriage before conversion to Mahammadanism is not dissolved by mere conversion. *Rahmed Bebee* v. *Rokeya Beebee*[1] dissented from. [But see *Thapita Peter* v. *Thapita Lakshmi*[2] and *Magama* v. *Prem Singh*[3] :—ED.]

Sheo Raj Nandan Singh *v.* **Gopal Suran Narain Singh.**—I. L. R. 18 C. 290.—In execution of a decree, certain properties were attached. The person in possession who was not the judgment-debtor preferred a claim under S. 278, C.P.C. The claim was disallowed on the ground that the claimant had become a trustee for the judgment-debtor by virtue of an alleged agreement on his part to discharge the decree-holder's debt contained
[* 493] *in a *hibbanama* by which the judgment-debtor had transferred the property to the claimant. The conditions of the *hibbanama* were admitted by the claimant. *Held*, on a petition to the High Court under S. 622 C. P. C., by *Petheram*, C. J. that the lower Court was acting beyond its jurisdiction in directing the property to be attached in execution. Per *Ameer Ali*, J.—(1) The Lower Court has acted illegally and with material irregularity in the exercise of its jurisdiction, in directing execution to issue, against properties held by petitioner under a deed of gift. (2) In such cases what the Court has to see is, whether the property, though standing in the name of the claimant or some other person, is in reality in the possession of the judgment-debtor, and if a claimant satisfies the Court that he has

1. 1 Nort. Lead. Case. 12.
2. (1894) I.L.R. 17 M. 235.
3. (1906) 8 Bom. L.R. 855.

some interest in, or is possessed of, the property, and it does not appear that his possession is in reality that of the judgment-debtor, the claim must be allowed. The mere fact that the judgment-debtor has some beneficial interest in it does not render it liable to attachment for his debts. [*Ameer Ali* J. adhered in a later case to the view expressed by him in this case, *viz.*, that in an investigation under Ss. 278, 279, C.P.C., no question of title to the property attached can be gone into and that, if the claimant is in possession on his own account, the fact that the judgment-debtor may have a beneficial interest or some title in it cannot be gone into. See *Monmohiney Dassee* v. *Radha Kristo Dass* [1] :—Ed.]

Ismail Solomon Bhamji *v.* Mahomed Khan.—I.L.R. 18 C. 296.—An order made upon a claim filed under S. 278, C. P. C., is an order in the suit within the meaning of S. 37 of the Presidency Small Cause Courts Act and is final, subject only to the right to apply for a new trial; where such a claim has been disallowed, a suit brought under S. 283 of the Code, to establish the right claimed to the property in dispute is not maintainable in *any* Court. The exclusion by the Small Cause Court, under the powers conferred on it by S. 23 of the Presidency Small Cause Courts' Act, 1882, of S. 283 C.P.C. has not been affected by Act X of 1888. [See also *Deno Nath Batabyal* v. *Nuffer Chunder Nandy* [2] :—Ed]

Hurro Nath Rai Chowdhri *v.* Randhir Singh.—I. L. R. 18 C. 311; L. R. 18 I. A. 1.—A creditor advanced money for the payment of Government revenue due upon an estate of a Hindu widow on a mortgage of it. The creditor's agent received rents from part of the estate. In a suit to recover the sums lent, from reversioners in possession of the land, the Privy Council *held*, that the plaintiff ought to have taken care that the rents received by his agent were applied in part reduction of the debt, and that the same should be deducted therefore from the sum chargeable on the estate. [See *Ramasami Chetti* v. *Mangaikarasu Nachiar* [3]:—Ed.] *Held* also that it was plaintiff's duty, to see, whether the rate of interest charged was reasonable, and he could get only a reasonable rate of interest, as against the

1. (1902) I. L. R. 29 C. 543. 2. (1899) I. L. R. 26 C. 778 (784).
3. (1894) I. L. R. 18 M. 113 (118).

reversioner. [See *Heramba Chandra Pal Chowdhuri* v. *Kasi Nath Sukul*[1] :—ED.]

Sriram Samanta *v.* **Kalidas Dey.**—I.L.R. 18 C. 316.—Plaintiff obtained a decree for possession of certain land of which he had been dispossessed. Plaintiff again brought a suit for mesne profits for the period he was out of possession. *Held* this was not of a Small Cause nature. [There seems to be some conflict of opinion on this question in the Indian Courts. The Calcutta Court in a Full Bench Case reviewed all the authorities including the case under notice, and overruling it, *held* that a suit for mesne profits was cognizable by a Small Cause Court. The Bombay High Court has, however, taken a contrary view, and has affirmed the principle laid down in the case under notice, *viz.*, that such suit is not cognizable by a Court of Small Causes See *Antone* v. *Mahadev Anant*[2]. Cf. also *Kunjo Behary* v. *Madhub*[3]. A Full Bench of the Madras High Court *held* that a suit for the profits of immoveable property belonging to the plaintiff wrongfully received by the defendant, who dispossesed the plaintiff in execution of a decree afterwards set aside on appeal, was not cognizable by a Court of Small Causes.—*Savarimuthu* v. *Aithurusu Rowthar.*[4] :—ED.]

Roghu Nath Pershad *v.* **Harlal Sadhu.**—I. L. R. 18 C. 320.—A mortgagee brought a suit on a mortgage bond against defendants who were subsequent purchasers of the land. It was contended that the defendants were entitled to require the mortgagee to apportion his claim amongst the various *properties mortgaged and to accept the rateable share from each defendant. *Held* that this was not the intention of S. 82 of the Transfer of Property Act, but that the section simply determined the liabilities of the purchasers *inter se*, and as regards the satisfaction of plaintiff's claim, all the properties were liable. [See also *Kuppusami Chetti* v. *Pappathi Ammal*[5]; *Krishna Ayyar* v. *Muthu Kumarasamiya Pillai*[6] :—ED.]

* 494]

Jogodindro Nath *v.* **Sarut Suuduri Debi.**— I. L. R. 18 C. 322.—An order made by an Appellate Court under S. 373 C. P.C., giving permission to withdraw a suit with liberty to bring

1. (1905) 1 C. L. J. 199 at pp. 209, 210.
2. (1900) I. L. R. 25 B. 85.
3. (1896) I. L. R. 23 C. 884.
4. (1901) I. L. R. 25 M. 103.
5. (1897) I.L.R. 21 M. 369,
6. (1905) I.L.R. 29 M. 217 at p. 222.

a fresh one, is not a decree within S. 2 and is not appealable. *Ganga Ram* v. *Data Ram*[1] disented from and *Kalian Singh* v. *Lekhraj Singh*[2] approved of. [See also *Abdul Hossein* v. *Kasi Sahu*[3]; *Jagdesh Chaudhri* v. *Tulshi Chaudhri*[4]; *Genda Mal* v. *Pirbhu Lal*[5]; *Ramakissor Dossji* v. *Srirangacharlu*[6].—ED.]

Bepin Behari Chowdhry *v.* Annoda Prosad Mullick.—I.L.R. 18 C. 324.—It is only when an arbitrator has first *consented to act* as an arbitrator, and afterwards dies or refuses, &c., that the Court has power to appoint a new arbitrator under S. 510 C.P.C.

Charu Chunder Pal *v.* Nobo Sunderi Dasi.—I. L. R. 18 C. 327.—Under the Bengal School of Hindu Law, a widowed daughter having a son, who is dumb at the time the succession opens and who is not shown to be incurably dumb, is entitled to succeed to her mother's *Stridhan* in preference to a daughter's son.

Kodai Singh *v.* Jaisri Singh.—I.L.R. 13 A. 189.—The plaintiff in a pre-emption suit obtained a decree and the decree provided that a certain price should be paid within a certain time and the case should stand dismissed if the terms were not complied with. *Held* that after the expiration of the time fixed for payment, he was entitled to appeal both in respect of the price and the time allowed for payment of the same.

[This is the same as the report at p. 376. See also *Wazir Khan* v. *Kale Khan*[7]. But if the appellate decree does not extend the time or fix the time and the original decree is affirmed and the executing Court cannot receive payment on the expiration of the time limited in the first Court—see *Jaggar Nath* v. *Jokhu Tewari*[8]. Where there is no appeal the decree for pre-emption cannot be enforced after the expiry of the time fixed. See *Jai Kishn* v. *Bhola Nath*[9]:—ED.]

Anandi Ram *v.* Dur Najaf Ali Begum.—I. L. R. 13 A. 195.—A mortgagee, in possession of the mortgaged property, paid to the Government the arrears of Government revenue, that the property might not be sold. Subsequently, the mortgagor,

1. (1885) I.L.R. 8 A. 82.
2. (1884) I.L.R. 6 A. 211.
3. (1899) I.L.R. 27 C, 362.
4. (1893) I.L.R. 16 A. 19.
5. (1895) I.L.R. 17 A. 97.
6. (1898) I.L.R. 21 M, 421.
7. (1893) I.L.R. 16 A. 126.
8. (1896) I.L.R. 18 A. 223.
9. (1892) I.L.R. 14 A. 529.

paid the original mortgage amount into Court under S. 83, T. P. Act. The mortgagee received the money, and quitted possession of the property, in favor of the mortgagor. The mortgagee subsequently instituted a suit, for recovering the money paid as Government revenue by sale of the mortgaged property. *Held*, that such a suit was not sustainable, and the mortgagee could not obtain a lien independently of that under his mortgage and he having abandoned his lien and rights as mortgagee, he could not now revive them in order to sustain a suit, though he could have added those payments to the original sum due under the mortgage, and brought the property to sale in respect of both the sums in one and the same suit. *Semble*, a mortgagee might, under the circumstances, be entitled to bring a simple money suit. See S. 69, Contract Act. [Whre under the original mortgage a person is not entitled to sue for recovery of the mortgage money by sale of the mortgaged property the amount to be added to the mortgage is on the same footing. See *Perianna Servaigaram* v. *Marudai Nayagam Pillai*[1] :—ED.]

Naubat Singh *v.* **Indar Singh**, I. L. R. 13 A. 200. A suit by a mortgagor for payment of the money under a
[* 495] registered mortgage deed, together* with damages for non-payment, is not a suit for specific performance of a contract under Art. 113, Sch. II, Limitation Act, but it is a suit for compensation for the breach of a contract in writing registered under Art. 116, and the period of limitation is 6 years and it begins to run from the date of the execution of the mortgage deed, in the absence of a contract to the contrary.

Bansi *v.* **Sikree Mal,** I.L.R. 13 A. 211.—The making of an application by the decree-holder for leave to bid at the sale in execution of the decree is a step in aid of execution within Cl. 4, S. 178, Sch. II, Limitation Act.

[The question has been considered more recently by the Calcutta Court in *Hira Lal Bose* v. *Dwija Charan Bose*[2]. Mr. Justice *Rampini* held in this case following the cases of *Toree Mahomed* v. *Mabood Bux*[3] and *Raghunundun Misser* v. *Kallydut Misser*[4] but dissenting from the opinion of *Banerjee* J.

1. (1899) I.L.R. 22 M. 332 (336) per *Subrahmania Aiyar J.*
2. (1905) 3 C.L.J. 240 ; 10 C.W.N. 209. 3. (1883) I.L.R. 9 C. 730.
4. (1896) I.L.R. 23 C. 690.

in the case of *Troylokya Nath Bose* v. *Jyoti Crokash Nandi*[1] that an application for leave to bid was not a step in aid of execution and would not therefore save limitation. Mr. Justice *Mookerjee*, however, adopted a different line of reasoning. He held that permission for leave to bid could not of itself be taken to be a step in aid of execution without anything more; that in order that such an application might be taken to be a step in aid of execution the circumstances under which such application was made must be taken into consideration, that there might be circumstances which would render an application for leave to bid taken with the granting of such leave an effective aiding of execution and that under those circumstances, an application for leave to bid would save the bar. In Allahabad the principle of the decision in *Bansi* v. *Sikree Mal*, the case under notice, has been followed—see *Dalel Singh* v. *Umrao Singh*[2]:—Ed.]

Bhagwani v. Manni Lal.—I.L.R. 13 A. 214.—An order that the certificate of heirship will be granted on the applicant's furnishing security, is not a final order "granting, refusing or revoking a certificate" under S 19 of the Certificate Act, but simply an interlocutory order, and as such not appealable.

Haji Musa Haji Ahmed *v.* Purmanand Nursey.—I.L.R. 15 B. 216.—A Zillah Court in the State of Cochin passed a decree in favour of the plaintiff. The decree-holder sought to execute the decree against the defendant in Bombay, under S. 229-*B*., C. P. C. A notice was issued under S. 245-*B* to the defendant to show cause why he should not be committed to jail. The defendant urged that the Cochin Court had no jurisdiction to pass the decree and that the plaintiff had obtained the same fraudulently. *Held*—(1) that under S. 229-*B* the Court was not bound to execute the decree of a foreign Court, but was entitled to exercise a judicial discretion whether it would enforce execution; (2) that the Court was not precluded from ascertaining whether a foreign Court had jurisdiction merely because that Court itself decided an issue upon that point in its own favour; (3) that in the case of a foreign judgment a party to a suit might in execution show that the decree was obtained by fraud; (4) that S. 229-*B* had not the effect of removing the decree of a Native

1. (1903) 8 C. W. N. 251 Sc. I. L. R. 30 c, 761 at p. 769.
2. (1900) I. L. R. 22 A 399.

State falling within its purview from the category of foreign judgments, but merely altered the procedure by which it was to be enforced; (5) that the Court would not send British subjects into a foreign coun- try to get relief from a fradulently obtained decree when it could give such relief itself; (6) that a decree-holder entitled to apply for execution under S. 229-*B* might also file an original suit to enforce the foreign judgment.

Obiter.—Even in the case of British Courts, the Code recognizes in S. 225 the right of the executing Court to enquire into the jurisdiction of the Court which passed it. *Quaere.*—Whether, when a decree is obtained by fraud in a British Court, a party against whom it is passed may resist execution on that ground.

Dosibai *v.* Ishvardas.—I.L.R. 15 B. 222; L.R. 18 I.A. 22.—When a *Jaghir* is granted in indefinite terms it is taken to be for the life only of the *Jaghirdar*. But where there is a grant to a man and his heirs and nothing to control the ordinary meaning of the words, the grantee takes an absolute
[* 496] interest. When *once a property is under attachment, at the suit of a creditor to enforce a portion of a debt, which had accrued at an earlier period, a sale of the property in satisfaction of a decree in favour of the same creditor, for subsequent instalments, under the same instruments, is valid, without a second order of attachment.

Manjappa Hegade *v.* Lakshmi.—I.L.R. 15 B. 234. —The widow of an undivided brother does not take a life-estate. She is only entitled to maintenance.

Obiter.—She may perhaps succeed her brother-in-law as *Gotraja Sapinda*. A person who purchases the share of a co parcener in family property is entitled to recover that share on his vendor's succession to the property as against the vendor himself and the widow of his undivided brother.

Girianna *v.* Honama.—I.L.R. 15 B. 236.—A Hindu widow whose husband has directed that she shall be maintained in the family house, is not entitled to maintenance if she reside elsewhere without proper cause. [See also *Bhoba Tarini Debya* v. *Peary Lall Sanyal*[1]:—ED.]

1. (1897) I. L. R. 24 C. 646 (655, 656.)

Bandu v. Naba.—I.L.R. 15 B. 238.—According to English law, the rightful owner of property, dispossessing another, is no trespasser and may rely for the support of his possession on the title vested in him already and subject to S. 9 of the Specific Relief Act. The same is the law in India. [See also *Protap Chandra Chatterjee* v. *Durga Charan Ghose*[1]:—ED.]

A person who has obtained a decree for possession of immovable property, if he succeeds in getting possession without the intervention of the Court, is not a trespasser and may defend his possession on the strength of his title.

Dalichand Bhudar v. Bai Shivkorl.—L. R. 15 B. 242—An application for partial execution of a decree, though not in accordance with law, is a step-in-aid of execution under Cl. 4, Art, 179, Sch. II, Limitation Act. A judgment-debtor who did not appeal against a previous order for execution of a portion of the decree, and who did not dispute the validity of such order, could not, in the matter of a subsequent application for execution of the remaining portion of the decree, contend that the first application was "not in accordance with law" and that the subsequent application being presented after the lapse of three years from the date of the decree, was barred by limitation. [See also *Keshav Lal Bechar* v. *Pitamberdas Tribhuvandas*[2] and *Nepal Chandra Sadookhan* v. *Amrita Lall Sadookhan.*[3]—ED.]

SUMMARY OF *ENGLISH CASES. [* 488]

Daniel v. Ferguson. [1891] 2 Ch. 27.

Injunction—Notice of motion—Subsequent notice of interim order—Anticipating order of Court by raising wall in the interval—Liability to pull down.

Where, after receiving notice of motion for injunction, and before notice that an interim injunction had been granted, the defendant ran up a wall to the height of 40 feet and thus attempted to anticipate the order of the Court, it was held that the wall must be pulled down at once without any regard to the result of the trial.

1. (1905) 9 C. W. N. 1061.
2. (1894) I. L. R. 19 B. 261.
3. (1899) I. L. R. 26 C. 888.

Bolton v. Salmon. [1891,] 2 Ch. 48.

Surety—Alteration of contract between creditor and principal debtor—Release of surety's security.

Any alteration of the contract between the principal debtor and creditor, which has the effect of discharging the surety from personal liability also releases any security given by the surety.

Coxon v. Gorst. [1891] 2 Ch. 73.

Company—Winding up by Court—Dissolution—No action to discharge order—Sums paid wrongfully in the shape of dividends—No action against directors.

Where a Company has been dissolved by order of Court in a winding up by the Court, an action cannot, in the absence of fraud, be maintained to discharge the order of dissolution, or to recover from the Directors sums wrongfully paid away in the shape of dividends. An action of the latter kind cannot be maintained even during the existence of the Company.

Fisher v. Jackson. [1891] 2 Ch. 84.

Endowed school—Three vicars empowered to appoint and dismiss schoolmaster—Dismissed by two without consulting other—Schoolmaster not given opportunity—Injunction against dismissal—Charitable Trust Act, S. 17.

Where, under the deed of trust establishing an endowed school, the power of appointing and dismissing the schoolmaster was vested in three vicars, and two of these without convening a meeting of all three, or consulting the other vicar, and without giving the schoolmaster an opportunity of being heard in his defence, gave him notice of dismissal, the schoolmaster was held entitled to an injunction to restrain the two vicars, who had given him notice, from removing him, until after the holding of a meeting of the vicars in accordance with the terms of the deed of trust, and until the plaintiff should have had an opportunity of being heard at such meeting. It was also held, following *Rendall* v. *Blair*,[1] that the consent of the Charity Commissioners was not required for the action under S. 17 of the Charitable Trusts Act.

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1. (1890) 45 Ch. D. 139.

In re **Pride: Shackell** *v.* **Colnett.** [1891] 2 Ch. 135.

Mortgage of whole estate—Purchase by part owner of remaining—Conveyance set aside—Charge on remaining part kept alive—Intention.

Where the owner of five-sixths share of an estate purchased the remaining sixth share also, and pending a suit to set aside the sale of that sixth, paid off a mortgage, to which the whole estate was subject, and the conveyance was afterwards set aside, it was held that the person paying off the mortgage must be presumed to have intended to keep the charge alive as against the one-sixth.

Greenwood *v.* **Turner.** [1891] 2 Ch. 144.

Vendor and purchaser—Real property—Purchaser obtaining possession and retaining even after time fixed for completion—Title found defective—No waiver—Right to elect surrender or payment of price.

Where a person enters into a contract to purchase real property, and obtains possession of the property and retains it after the time fixed for the completion of the contract *without [* 489] payment of rent or interest, and the vendor sued for the price alleging that the defendant had accepted a defective title by his conduct, it was decided that the purchaser could not be supposed to have accepted the title, and that he must be allowed to elect whether he would retire from possession or continue and pay the price, unless he has done something to interfere with the value of the property.

McMahon *v.* **North Kent Ironworks Company.** [1891] 2 Ch. 148.

Company—Debenture—Charge on present and future property—Insolvency—Floating security—No default—Right of debenture-holders for appointment of receiver—Security in jeopardy.

The debentures of a Company created a first charge on all its property present and future by way of floating security. The Company becoming insolvent, one of the debenture-holders applied for the appointment of a Receiver for the protection of the debenture-holders' interests, though the principal sum payable

under the debenture had not fallen due, and no default had been made in the payment of interest. The relief was granted on the ground that a mortgagee had a right to the protection of his security if it was in jeopardy.

In re **Opera, Limited.** [1891] 2 Ch. 154, reversed by C.A. [1891] 3 Ch. 260.

Officer of Court—Receiver—Increase of assets—Honest mistake of law—Mistake not capable of rectification between ordinary parties—Court will compel officer to observe honesty.

If assets in the hands of an officer of Court on behalf of creditors or others have been increased by a transaction occasioned by an honest mistake of law, then, notwithstanding such mistake is not capable of rectification as between ordinary adverse litigants, the Court will compel its officer to recognize the rules of honesty as between man and man and to act accordingly.

Barker *v.* Furlong. [1891] 2 Ch. 172.

Trustee and cestui-que-trust—Trustee's right to immediate possession—Cestui-que-trust in occupation under the trust—Trustees' right to bring trover—Auctioneer not receiving goods but settling price and taking commission—Not liable for conversion.

When a *cestui que trust* is in occupation under a trust, the trustee has an immediate right to possession in the eye of the law, sufficient to enable him to bring an action of trover against a third person.

When there is a right of immediate possession coupled with a title to goods, though the title may not be perfect as against, or may even be liable to be defeated by, the claim of a third person, yet, if that third person has not intervened, a wrong-doer dealing with the chattels cannot set up the title of that third person as an answer to an action against him for wrong-doing. If an auctioneer or broker does nothing more than settle the price between a vendor and purchaser of goods and take his commission, he is not liable as for a conversion, should it turn out that the vendor was not entitled to sell. But where the auctioneer receives the goods into his custody, and on selling them, hands over the goods to the purchasers with a view to passing the property in them, the auctioneer is liable for

conversion to the true owner. Cf. *Rodgers Sons & Co.* v. *Lambert & Co.*[1]

The Queen *v.* **Jackson** [1891] 1 Q.B. 671.

Husband and wife—Restitution of conjugal rights—Decree in husband's favour—Wife's refusal to join—Wife not liable to arrest.

Where a husband has obtained a decree for restitution of conjugal rights, but the wife refuses to join him, he is not entitled to seize and keep her in confinement. (*Per Lord Halsbury* C. J. *Lord Esher* M. R., and *Fry* L. J.).

De Souza *v.* **Cobden.** [1891] 1 Q. B. 687.

Municipal Corporation Act, 1882, *Ss.* 41, 73—*Person acting for corporate officer without being qualified—Penalty—Election deemed valid if not questioned within a definite period—Not applicable to void elections.*

S. 41 of the Municipal Corporation Act, 1882, provides that if any person acts in a corporate office " without being qualified &c," he shall for each offence be liable to a fine. S. 73 provides that every municipal election not called in question within twelve months shall be deemed, to all intents, to have been a good and valid election. *These provisions have been extended [* 490] to County Councils. The defendant, a woman, having been elected a member of a County Council, twelve months elapsed without the election being questioned. After the expiry of the twelve months she acted as a member.

Held by *Lord Coleridge*, C. F., *Lord Esher*, M. R., *Fry*, L. F., that the defendant was liable to the penalties imposed by S. 41 for acting when disqualified.

Per *Lord Coleridge* C.F.—The election cannot be questioned, and she must be deemed to have been validly elected.

Per *Lord Esher.*—S. 73 applies to cases of irregularities in elections, which possibly might be good, and not to cases of elections, which by no possibility could be good. A woman cannot be considered to have been elected at all within the meaning of the section.

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1. (1891) 1 Q. B. 318.

Per Fry, L. F.—The election of a woman appears to be a mere nullity.

Ex Parte County Council of Kent and Council of Dover: *Ex parte* County Council of Kent and Council of Sandwich. [1891] 1 Q B. 725.

Local Government Act, 1888, *S.* 29—*Jurisdiction of High Court, consultative not judicial—No appeal—Judicature Act*, 1873, *S.* 19.

The jurisdiction of the High Court of Justice upon questions submitted to it for "decision" under S. 29 of the Local Government Act 1888, is consultative only, and not judicial, and no appeal lies from its decision to the Court of Appeal, notwithstanding S 19 of the Judicature Act of 1873.

Per Curiam.—An appeal must be given, and is not to be presumed.

Jones *v.* Foley. [1891] 1 Q. B. 730.

Landlord and Tenant—Determination of tenancy—Wrongful refusal by tenant to deliver possession—Landlord, for purpose of re-building, sending workmen to remove roof—Tenant's furniture damaged by falling of part of roof—Trespass—No cause of action.

A tenant wrongfully refused to give up possession on the expiration of the tenancy. The landlord desirous of re-building the cottage, sent workmen to remove the roof. In the course of removal, which was done not with the object of injuring the tenant but as a step in the demolition of the house, portions of the roof fell unavoidably on the tenant's furniture in the room below and damaged it. In an action by the tenant, for trespass and injury to the furniture, *Held* by *Day*, and *Lawrance*, FF., that the plaintiff had no cause of action, as the defendant was at common law entitled to resume possession, and she did not commit a forcible entry in so doing.

Salaman *v.* Warner. [1891], 1. Q. B. 734.

Plea that statement of claim disclosed no cause of action—Trial on preliminary issue—Dismissal of action—No final order—Order 58, *rule* 3.

The defendant pleaded that the statement of claim disclosed no cause of action. This was set down for hearing before trial

of the other issues and the action was dismissed. The Court of Appeal *held* that this was not a final order within the meaning of Order 58, *r.* 3. A final order is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. [*Standard Discount Co.* v. *La Grange*,[1] followed.]

Comfort *v.* **Betts.** [1891] 1 Q. B. 737.

Chose in action—Absolute assignment in trust for creditors—Judicature Act, 1873, *S.* 25, *Sub-s.* 6.

The creditors of the defendant assigned their debts to the plaintiff, to hold the same absolutely It was provided that the plaintiff should proceed to recover the same and pay them according to their shares. *Held* by the Court of Appeal that although a trust was created in respect of the proceeds of the debts in favour of the assignors, the assignment was absolute within Sub-s. 6, S. 25, of the Judicature Act of 1873 and that the plaintiff was entitled to sue.

***Smith, Hill and Co.** *v.* **Pyman, Bell and Co.** [* 491]
[1891] 1 Q. B. 742.

Charter-party—Advance of $\frac{1}{3}$ *freight less* 3 *p. c.—Ship wrecked and cargo lost—Charterer not liable for freight.*

A charter-party provided that one-third freight was to be advanced by the charterer if required, less 3 *per cent.* for interest and insurance. The ship was wrecked and the cargo lost. After the loss the shipowner called for the payment of the advance freight. *Held* by the Court of Appeal reversing the judgment of *Charles* J., in 1891, 1. Q. B. 42, that the charterer was not liable, as the requirement by the shipowner was a condition precedent to the liability of the charterer to pay advance freight, and it was made too late. Per *Lord Esher* (*Fry* L. F., concurring):—Ordinarily no freight would be payable if the cargo was not delivered. If part of the freight is advanced and the ship is lost or the goods are lost, the part paid though really not due under the contract cannot be recovered back. If there is a mere stipulation that there shall be advance freight, it is payable at the moment of starting and can be recovered by the shipowne

1. (1877) 3 C.P.D. 67.

even upon the loss of the ship from the charterer. *Per Curiam*:—The shipowner not having called for the advance at a time when it could be insured, the advance in this case could not be sued for. See *ante* p. 151.

Hoare v. Niblett. [1891] 1 Q. B. 781.

Joint contractors—Judgment against one—Bar—Rule applicable to joint-contractor being a married woman and contracting in respect of her separate estate.

The rule that judgment recovered against one of two joint contractors is a bar to an action against the other, applies equally when one of the joint contractors is a married woman contracting in respect of her separate property.

[* 501] *SETTING ASIDE COMPROMISES.

We propose to consider in this article the circumstance under which compromises may be set aside, whether they have been embodied in a decree of Court or not. It stands to reason that whenever a compromise can be set aside, a decree passed in pursuance of it shoud be equally liable to be set aside. See *Attorney General.* v. *Tomline.*[1] [Mr. Justice *Fry* observed in that case: "In my opinion when a consent order has been drawn up, passed. and entered, it is not competent to this Court to vary that order, except for reasons which would enable the Court to set aside an agreement.":—ED.] It is, therefore, necessary to consider on what grounds a compromise can be impeached. The inquiry will be facilitated by a statement of the conditions essential to the validity of a compromise. There must, in the first place, be a *bona fide* claim, a real question to be decided between the parties. It is immaterial whether the claim can be sustained in law or fact before a Court of justice. [The existence of a doubtful question will of course support a compromise[2]; but] it is not even necessary that the question should be really doubtful; it would be sufficient if the parties honestly believed it to be so. If a plaintiff, knowing that he has no case, falsely brings an action, or a defendant, knowing that he has no defence, falsely raises a plea, the false claim or plea will not support a compromise. See

1. (1877) 7 Ch. D. 388.

2. *Cf.* *Subba Reddi* v. *Kotamma* (1904) 14 M. L. J. R. 442; *Malla Reddi* v. *Aswaratha Reddi* (1905) 15 M. L. J. R. 494.

Wade v. *Simeon*[1]; *Callisher* v. *Bischoffsheim.*[2] In *Rajunder Narain Rae* v. **Bijai Govind Sing*[3] the suit was brought by the [* 502
heirs of a deceased person to set aside a compromise they had entered into with a person who claimed to be the adopted son of the deceased. The Privy Council laid down that, if the adoption were clearly proved to be untrue, it must necessarily have been untrue within the knowledge of the claimant, and any deed of compromise founded on an assertion of such matter by him, however deliberately entered into by the heirs at law, would unquestionably be invalid. [The *claim* must be *real* and *honest*. The *reality* of the claim is not measured by the state of the law as it is ultimately discovered to be[4] but by the state of the knowledge of the person who at the time has to judge and make the concession. A claim is *honest* if the claimant does not know that his claim is unsubstantial, or if he does not know facts to his knowledge, unknown to the other party which shew that, the claim is a bad one. The real consideration in a compromise is not the sacrifice of a right but the abandonment of a claim—ED.]

Secondly, the parties must be *on equal terms*, and have acted with equal knowledge or means of knowledge with respect to the mode in which, and the circumstances under which, the claim arises. *Lastly*, there must be a *full* and *fair communication* on both sides of all matters which are relevant, whether the information is asked for or not. See *Maynard* v. *Eton.*[5] A party to a compromise must not take it upon himself to decide that a suppressed fact is immaterial, if it could by any possibility have had an influence on the decision of the other party. [See KERR on *Fraud*, 4th Edition, p. 104.] In fact, a compromise falls within the class of contracts, in which there is a special duty to speak, and silence will be held to be fraudulent.

We shall now see how far a compromise is liable to be avoided on the grounds which usually render contracts voidable. If the compromise is induced by fraud in the shape of *suggestio falsi*, it is clearly voidable. In *Gilbert* v. *Endean*[6], a decree was passed by consent for a certain amount. By a subsequent compromise, the plaintiff agreed to accept a smaller sum on the

1. (1846) 2 C. B 548.
2. (1870) L. R. 5 Q. B. 449.
3. (1839) 2 M. I. A. 181 at p. 244.
4. Cf. *Subba Reddi* v. *Kotamma* (1904) 14 M.L.J.R. 442; *Malla Reddi* v. *Aswatatha Reddi* (1905) 15 M.L.J.R. 494.
5. (1874) L. R. 9 Ch. App. 414.
6. (1878) 9 Ch. D. 259.

ground of the defendant's poverty. It was represented to plaintiff at the time by the defendant's solicitor that the defendant's father, who was a man of property, had refused to assist the defendant. The solicitor was aware at the time that the defendant's father had died intestate, and that the defendant was entitled to a share of his father's property, more than sufficient to pay all his debts. The plaintiff moved the Court to enfore the decree in spite of the compromise, and execution was accordingly allowed. In *Paranjpe* v. *Kanade*[1], the decree-holder accepted a smaller sum than the amount decreed on account of a representation by the defendant that he had preferred appeals against the plaintiff's
[* 503] decrees. The defendant omitted to mention* that the appeals had been rejected, and he thus wilfully led the plaintiff into the false impression that the appeals were pending; and the case may be considered as much a case of *suggestio falsi* as of *suppressio veri*. The plaintiff, who had certified satisfaction of the decree, was held entitled to execute for the balance due. The Court observed: "It is always competent to any Court to vacate any judgment or order, if it be proved that it was obtained by manifest fraud." *Suppressio veri* has the same effect on a compromise, as the parties are under a mutual obligation to make a full disclosure of all material circumstances. In *Brook* v. *Lord Mostyn*[2], an infant sued to declare that a compromise, which had been sanctioned by the Court on his behalf, was not binding on him. Though the decision of the Master of the Rolls on the question of fact was reversed in appeal, his observations on the principles governing such cases were left untouched. It was observed: "If by suppression or misstatement, the Court has been led to an erroneous conclusion, the persons who have done this are amenable to justice in exactly the same manner as they would have been, where the deception had been practised on persons other than the Judge and without the intervention of the Court to sanction it. This is an equity which extends far beyond the case of infants, and extends to every case where the Court has been intentionally deceived and has been made the involuntary instrument of depriving others of their just rights. See *Brydges* v. *Branfill*[3]. In all such cases, the Court

1. (1882) I. L. R. 6 B. 148.
2. (1864) 33 Beav. 458.
3. (1841) 12 Sim. 369, 59 E.R. 1174.

will afterwards, if possible, set aside the transaction as against the innocent party, or if that be not possible, will, as far as it can, prevent the further operation of it on him. But in order to induce the Court to take this step, it must be shewn that the parties to the transaction have intentionally suppressed the truth or suggested error in order to mislead the Court." In *Priestman* v. *Thomas*[1], a compromise, by which a will propounded by the defendants and opposed by the plaintiff was admitted to probate, was set aside on the ground that one of the defendants had concealed his knowledge of the forgery of the will.

Misrepresentation by a party to a compromise, however innocent, affects its validity just like fraud. In *Bibee Solomon* v. *Abdool Azeez*[2] the Court had sanctioned on behalf of a minor a compromise entered into on the basis of a representation* by the [* 504] defendants in an application for probate as to the value of the estate out of which the minor had a right to share. The estate being subsequently found to be larger, the compromise was set aside, on the ground that even though there was no actual fraud, the compromise had been made under a misapprehension of a material fact caused by a misrepresentation. The judgment of *Sir Richard Garth*, C. F., was also rested on the ground of a common mistake of fact within the meaning of S. 20 of the Contract Act. In *Leonard* v. *Leonard*,[3] a deed of compromise was procured by the opinion of counsel upon a case laid before him, prepared by the defendant's agent, which stated that the estates, the subject of the compromise, were held under a joint tenancy, while they were really held in common. The compromise was held invalid, and it was laid down that it was essential to the validity of a compromise that both the parties should be in equal ignorance, and that a compromise of rights doubtful in point of law, but founded on a misrepresentation or suppression of facts within the knowledge of one of the parties only could not be supported.

It is when we come to the consideration of *mistake*, as one of the invalidating causes of compromises, that we find much difference between this class of contracts and others. Ordinarily a mistake common to both parties on matters of fact, or right,

1. (1884) 9 P. D. 210.
2. (1881) I. L. R. 6 C 687.
3. (1812) 2 Bal & B. 171

essential to the agreement, is fatal to its validity. See *Cooper* v *Phibbs*[1]. Mistakes are either bilateral, or unilateral, and may be either in regard to facts, or to law. With regard to bilateral mistakes of fact, if the minds of the parties are addressed to the matter in respect of which the mistake is committed, and with a full knowledge of the doubts and difficulties that arise, the parties come to an agreement, the Court will not be disposed to disturb the agreement—*Pickering* v. *Pickering*.[2] But if the parties take a fact for granted and no doubts or difficulties are present to their minds, the ordinary rule prevails, and the agreement will be void—*Gibbons* v. *Count*[3]; *Harvey* v. *Cooke*[4] ; *Lawton* v. *Campion.*[5] See KERR on *Fraud* 4th Edition, p. 474. For instance, if, as in the case of *Rajunder Narain* v. *Bijai Govind*,[6] there is a contest between a person claiming as adopted son and the heirs of the deceased, and the parties entertain *bona-fide* doubts as to the fact of adoption, and enter into any arrange-
[* 505] ment, the *arrangement will be binding, even though the adoption is not true. Whether bilateral mistakes of law afford any ground for avoiding compromises is a matter which is not free from perplexity according to the English authorities. *Lord Eldon* drew a distinction in *Stockley* v. *Stockley*,[7] between cases where there is a doubt raised between the parties as to their rights and a compromise is made upon the footing of that doubt, and cases where the parties act on a supposition of right in one of the parties without a doubt upon it, under a mistake of law. This distinction had been denied in the earlier cases of *Cann* v. *Cann* [8], and *Stapilton* v. *Stapilton* [9]. And the distinction does not seem to have been since followed, at any rate with regard to pure mistakes of law unattended with any mistake as to the facts to which the law has to be applied. If the parties act in ignorance of a plain and established doctrine of law, the English Courts of Equity strive to release the parties from the position in which they have placed themselves, irrespective of the inquiry whether the point was doubted by the parties or not—*Naylor* v. *Winch*.[10]

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1. (1867) L. R. 2 H. L. 149.
2. (1841) 2 Beav. 31 and 56.
3. (1799) 4 Ves 840.
4. (1827) 4 Rus. 34, 58.
5. (1854) 18 Beav. 87.
6. (1839) 2 M.I.A. 181 at 244.
7. (1812) 1 Ves & B. 23 : 35 E.R. 9.
8. (1721) 1 P. W. 727
9. (1739) 1 Atk. 2. S. C. 2 White & Tuder L. C. (Equity) 920.
10. (1824) 1 Sim. & Stu. 555 S. C. 24 R. R. 227 (233)

It is, however, extremely difficult to demarcate between priciples which are clear and principles which are not clear, and the rule will give rise to great uncertainty in the law. The tendency of the Courts, however, is to narrow the exceptions to the rule that ignorance of law is no excuse; and it may be stated that a mere naked mistake of law, unattended with any special circumstances, will not induce the Court to interfere—*Stewart* v. *Stewart*;[1] STORY'S *Equity*, S. 138; KERR on *Fraud*, p. 474. A compromise in this respect differs from a release. A release in ignorance of facts or of legal rights can always be rescinded—see *Groves* v. *Perkins*;[2] *Pusey* v. *Desbouverie*;[3] *Macarthy* v. *Decaix*.[4] As pointed out by the Lord Chancellor in *Leonard* v. *Leonard*,[5] a release proceeds on the assumption that the party is aware of what legal right he is releasing, but a compromise is based on the ignorance of the parties as to their mutual rights. Under the Civil Law, relief would be given in case of an error of law in regard to heirship. A nephew, who gave up to his uncle the whole estate of another deceased uncle under the impression that the uncle was the sole heir, would be restored to his rights. See DOMAT'S *Civil Law** B. I. Tit 18 Sec. 1. [* 506]
In India the rule which relieves against a mutual mistake of a plain and settled principle of law has not been followed, at all events in the case of family compromises; and the test has been declared to be merely whether the parties considered the matter to be a doubtful point or not. In *Ram Nirunjun Singh* v. *Prayag Singh*[6], an arrangement between brothers was upheld, whereby a step-brother was granted a right of succession to the estate of his step-brothers, equally with their brother of the whole blood. Though the parties acted in ignorance of the law, the compromise was held binding. Where the mistake is on one side only, if the other party is aware of the true state of the facts or law, and is also aware that his opponent is labouring under a mistake, but stands by and does not correct the false impression of it, the other party, though not aware of the fact that his opponent is under a mistake, fails in his duty of volunteering material information, it is submitted that the compromise cannot

1. (1839) 6 Cl. & F 694.
2. (1734) 6 Sim 576.
3. (1734) 3 P. W. 316.
4. (1831) 2 R & M 614.
5. (1812) 2 Ball & B 171.
6. (1881) I. L. R. 8 C 138.

stand—*Pickering* v. *Pickering*[1]; *Harvey* v. *Cooke*[2]. In *Smith* v. *Pincombe*[3], a married woman sued to set aside a compromise of her right to certain real estates as having been fraudulently obtained. It was laid down by *Lord Truro*, that to render a family compromise binding, there must be an honest disclosure by each party to the other of all such material facts known to them relative to the rights and title of either, as are calculated to influence the judgment in the adoption of the compromise, and any advantage taken by either of the parties of the known ignorance of the other of such fact would render the compromise void in equity and liable to be set aside. Where again there is error on one side in a matter of fact which, though not included in the compromise must be regarded as the implied condition or foundation of the compromise, the agreement fails, irrespective of the state of knowledge of the other party—*Trigge* v. *Lavalle*[4]. The case of *Bibee Solomon* v. *Abdool Azeez*,[5] already quoted, will also serve as an illustration. But where a party to a compromise is influenced in his motives by a mistake on a matter which is not the foundation of the agreement, and the other side has no knowledge of either the facts or the mistake, the compromise cannot be annulled. In *Attorney General* v. *Tomline*[6], the action was by the Crown for damages for trespass on a mine. The defendant, under an erroneous impres-
[* 507] that he had received a* larger royalty from his lessee than he really had, consented to a sum being fixed as damages. It was decided that the judgment could not be set aside on the ground of mistake except for reasons sufficient to set aside an agreement.

In the matter of consideration also, compromises are to some extent different from other contracts. The claim which is compromised may turn out on subsequent investigation to have been entirely unfounded. It may be that the claim is utterly bad in law and cannot be sustained in a Court of Justice. Yet if the parties entertain a *bona fide* doubt about the claim, the compromise is valid—*Exprate Lucy*,[7] The consideration for the contract is not *the sacrifice of a right* which actually exists, but

1. (1841) 2 Beav. 31 (56).
2. (1827) 4 Russ. 58.
3. (1851) 3 Mac & G. 653.
4. (182) 15 moo. P. C. 276 : 9 Jur. N. S. 261.
5. (1881) I. L. R. 6 C 687.
6. (1878) 7 Ch. D. 388.
7. (1853) 22 L. J. Ch. 732.

the mere *abandonment of a claim* which the claimant honestly believes he has a chance of prosecuting to success—*Harvey* v. *Cooke*.[1]

The tendency of the Courts to uphold compromises, whatever may be the actual foundation of the claim, so long as it is honestly believed in, is most pronounced in the case of family arrangements—*Cann* v. *Cann*[2]; *Stapilton* v. *Stapilton*[3]. These arrangements are viewed with great favour by the Courts, provided they satisfy the essential condition of fair and full disclosure of all material facts, a condition which is most rigorously enforced in this class of compromises.

In *Gordon* v. *Gordon*[4], an agreement between two brothers, the younger of whom disputed the legitimacy of the elder, for a division of the family estates, was rescinded after the lapse of 19 years, the younger brother having been apprized at the time of the agreement of a private ceremony of marriage between their parents and not having communicated it to the elder. *Lord Eldon* observed: "Where family agreements have been fairly entered into without concealment or imposition upon either side, with no suppression of what is true, or suggestion of what is false, then although the parties may have greatly misunderstood their situation and mistaken their rights, a Court of Equity will not disturb the quiet which is the consequence of that agreement; but when the transaction has been unfair and founded upon falsehood and misrepresentation, a Court of Equity would have very great difficulty in permitting* such a contract to bind the [* 508]
parties. Though family agreements are to be supported where there is no fraud or mistake on either side, or none to which the other party is accessory, yet where there is mistake, though innocent, and the other party is accessory to it, the Court will interfere. In contracts of this sort, full and complete communication of all material circumstances is what the Court must insist on."

In *Greenwood* v. *Greenwood*[5], it was laid down by Lord Justice *Knight Bruce*, that "in order that a transaction not otherwise valid may be supported on the ground of its being a family

1. (1827) 4 Russ 34, 58 S.C. 38 E.R. 717.
2. (1721) 1 P. W. 723 S.C. 24 E.R. 586.
3. (1739) I Atk. 10 S. C. 26 E.R. I.
4. (1821) 3 Swans 400 S.C. 36 E.R. 910.
5. (1863) 2 De G. J. & S. 28 S.C. 46 E.R. 285.

arrangement, there must be a full and fair communication of all material circumstances affecting the subject-matter of the agreement which are within the knowledge of the several parties, whether such information be asked for by the other parties or not. In the case of family arrangements this Court expects and requires the most perfect *bonâ fides.*" In the case of *Harvey* v. *Cooke*[1], already quoted, an arrangement was held bad as a family compromise for want of full disclosure of the legal opinions received by the defendant, and of the state of the accounts. In *Ram Nirunjun Singh* v. *Prayag Singh*[2], the same principles were held applicable to compromises in India. A family compromise which satisfies all the conditions we have stated above will be binding on the parties and their heirs. Neither they, nor their heirs can be afterwards permitted to contend that there was no consideration for the sacrifice of rights involved in the compromise. To the extent that the parties have at the time powers of dealing with the property which is the subject of compromise, it will conclude all persons who claim as heirs of the parties, or are represented by the parties to the agreement. If, for instance, the manager of an undivided Hindu family or a widow in possession enters into an arrangement with other members of the family for the settlement of disputes with them regarding the family property, if the arrangement is such as a prudent and reasonable man acting for the benefit of the estate will enter into, it will bind respectively the junior members or the persons who succeed to the widow. The question in each case will be, what are the legal powers of disposition over the property in dispute possessed by the party professing to abandon his rights.
[* 509] The party in whose favour* the abandonment has been made will be entitled to all the rights which the other party has professed to confer, and is legally capable of conferring. If the party giving up his rights has only a limited interest in the property, the other party can obtain no larger interest by the mere fact of the arrangement being of the nature of a family compromise. To sum up, a compromise can be avoided on nearly all the grounds on which any other contract can be avoided.

The authorities already quoted establish that a compromise which has passed into a decree is exactly on the same footing

1. (1827) 4 Russ. 34; 58 S.C. 38 E.R. 717. 2. (1881) I.L.R. 8 C. 138.

as any other compromise and is liable to be vacated on the same grounds. [See also *Surendra Nath Ghose* v. *Hemangini Dasi*[1] :—Ed.] There are two remedies available to a party aggrieved, one by a review and the other by a fresh suit. Though the former remedy is pointed out as the more appropriate one in *Aushootosh Chandra* v. *Tara Prasanna Roy*,[2] the absence of a right of appeal in case of rejection of the application for review points out the latter course as the safer one. The remedy by a new suit has also the approval of the English authorities—*Davenport* v. *Stafford*.[3] Though Mr. Justice *Wilson*, in the case of *Aushootosh Chandra* v. *Tara Prasanna Roy*,[2] professes to adopt the principle of the decision in *Gilbert* v. *Endean*,[4] it does not support his opinion, but is, on the other hand, quite contrary to it. The Court of Appeal held that the proper mode of questioning the validity of the compromise would be by a fresh suit and not on an application to enforce the decree, but, as the objection had not been taken in the lower court, and the decision was right on the merits, their Lordships confirmed it. [As to the so-called doctrine of election of remedies, see *Mussamut Gulab Koer* v. *Badshah Bahadur*[5] :—Ed.]

S. S.

[The cases upon this subject since this article was penned are pretty numerous. As we find it difficult to introduce them without changing the substance of the article and as it is desirable to preserve intact what has been written by the able contributor who has now retired from the Bench we have not embodied all of them.—Ed.]

PARASARA MADHAVIYAM.

By this, the controversy even on the subject of marrying one's maternal uncle's daughter is disposed of, for the texts forbidding such marriages apply (or relate) to the offspring (male) of women married in the forms beginning with the *Gandharva*, as in those cases *sapindaship* (between the woman and her parents) does not cease, but not to the offspring (male) of women married in the forms beginning with the* *Brahma*, as there are [* 510]

1. (1906) I. L. R. 34 C. 83 (89).
2. (1884) I. L. R. 10. C. 6 12.
3. (1845) 8. Beav 503 S.C. 50 E.R. 198.
4. (1878) 9 Ch. D. 259.
5. (1909) 13 C.W.N. 1197, 10 C.L.J. 420.

Sruti, *Smriti* and the practice of good men favouring (or sanctioning) them (marriages) and as in these cases *sapindaship* ceases. The forbidding texts are (the following). Among them, *Sâtâtapa*:—"One of the twice-born classes having married one's maternal uncle's daughter, a woman of the mother's *gotra*, or a woman having the same *pravara*, should perform *chândrayana* penance." Also, *Paitinasi*:—"We learn[1] (from the sruti) that daughters of the father's and mother's sisters and of the maternal uncle are regularly[2] (*i.e.*, equal to) one's sisters, and that one should avoid them." Also, *Sumantu*:—"All the wives of (one's) father are (one's) mothers; their (*i.e.*, fathers'-wives') brothers are maternal uncles; [their sisters (are) mother's sisters[3]] ; and the daughters of these are (one's) sisters ; and their offspring are sister's children : otherwise they would cause unlawful intermarriage." *Vyasa* :—" Mother's *sapindas* should be carefully avoided by the twice-born."

But how can these texts which are of general applicability be limited (or relate) to special cases ? We say by force of special texts. Thus Manu says[4]—" Having approached the father's sister's daughter, mother's sister's daughter and, (daughter[5]) of mother's intimate[6] brother (who are like a) sister, one should perform *chândrâyana* penance. A wise man should not receive these three in marriage." '*Sister*' is an adjective qualifying ' father's sister's daughter' and the rest. '*Intimate*' qualifies 'mother's brother.' The word 'daughter' should be supplied there. '*Intimate*,' *i.e.*, closely related *i.e.*, a *sapinda* The meaning is a brother of (his) mother married in the forms beginning with *Gandharva*. By the words "*father's sister's daughter*" also is intended to be expressed father's sister married in the forms beginning with *Gandharva* whose sapindaship has not ceased. It is then that the

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1. Whenever the word विज्ञायते is used by the writers on Dharmasastra it is intended to convey the idea that the fact is ascertained from a *Sruti* or Vedic text known to the writer :—ED.

2. The Sanscrit word used is धर्मतः

3. This is not found in the Telugu Edition.

4. Ch. XI, § 171, 172 Sacred Book, Vol. XXV p.

5. The reading in Manu is मातुश्चभ्रातुस्तनयां (mother's brother's daughter.)

6. For the special use of this term in this connection, see commentary : —ED.

adjective 'sister' applied to her daughter would have a meaning; as there is cessation of *sapindaship*, in the forms of marriage beginning with *Brahma* the word 'sister' would be inapplicable. The same principle should be applied even to the case of mother's sister's daughter. Hence, on the strength of the text of Manu containing the words भगिनी (sister) and आप्त (intimate), the general prohibition is limited to special cases only. [But then in the forms of marriage beginning with the *Brahma*, would not marriage follow of the mother's sister's daughter as of the maternal uncle's daughter? Not so: Because in that case a prohibitive **Smriti* may be deduced (presumed) [* 511] from (in respect of) what is disapproved of by good (or eminent) men.[1]]

Yajnavalkya says[2] that what is disapproved of by good (or eminent) men should not be followed:—'But what is hated by the world and (therefore) does not lead to heaven, let him not do, though it be not at variance with the law.'

Though marrying one's maternal uncle's daughter is disapproved of by the good (or eminent) men of the North, still as the good (or eminent) men of the South practise it, this practice of the Northerns is not reprehensible (contradictory). Nor should the (practice of the) Southerns be suspected of having its source (or having originated) from passion[3], as such marriages are practised by persons who have indeed investigated what are the Vidhis (*i.e.*, affirmative injunctions or texts prescribing acts) and the Nishedhas (*i.e.*, texts prohibiting acts, *i.e.*, negative injunctions). But the marriage of mother's sister's daughter is disapproved of by the irreproachable practice of good men. There are *Sruti* and other texts sanctioning (or favouring) marriage of a maternal

1. The following occurs in the Telugu Edition in lieu of the portion in brackets. "For the word 'sister' would be inapplicable to the case of the forms of marriage beginning with *Brahma*, where *sapindaship* ceases. The same principle applies to the case of the mother. The marriage of one's maternal uncle's daughter is disapproved of by the good men of the North. But in the case of the good men of the South, who follow it, the marriage of one's mother's sister's daughter would become (legal) as is the marriage of one's maternal uncle's daughter. Not so: for it being disapproved of by good men, the *Smritis* forbidding it would take effect."

2. Ch. I, § 156.

3. If a practice can be said to have its origin in राग (desire or mental affection, no vedic text can be presumed in support of the practice:—ED.

uncle's daughter. Out of these, the wording of the sacred text[1] is[2] :—"O Indra! come to this sacrifice by commended paths and be propitiated by (or taste with pleasure) this portion (offered by us): They have offered this prepared *vapa*, (sacrificial oblation) as your portion like the maternal uncle's girl and paternal aunt's daughter." The meaning is this:—O Indra! You come to this our sacrifice by commended paths[3], and having come, taste with pleasure this portion given by us. They have offered you the *vapa* prepared, *i.e.*, dressed with ghee, &c. There are two illustrations to this (*i.e.*, that the *vapa* will be propitiable to you). As a maternal uncle's girl, *i.e.*, daughter, is the portion of the sister's[4] son, *i.e.*, may be taken by him, *i.e.*, is fit to be married by the sister's son and as father's sister's daughter is the portion of the son's son[5], even so this is your portion known (sacrificial oblation) as *vapa*. Also in *Vajasaneyaka*:—"Therefore from a common person the eater and the eatable are born: may we (the
[* 512] eater and the eatable) meet at the third or* at the fourth." From a common, *i. e.*, the same person the eater, *i. e.*, enjoyer, and the eatable, *i. e.*, the person to be enjoyed, both are born: and these two resolve together, 'may we meet, *i. e.*, marry, at the third or fourth person beginning from the common ancestor.' Though this (passage) is only eulogium, yet it is an authority as to the matter of its own or inherent meaning (*i. e.*, as to the matter contained therein) as it is not in contradiction to any other authority or proof, and as the texts which (apparently) contradict this have been explained (away) as having reference to one who is the mother's *sapinda*[6]. Hence, being strengthened (reiterated or corroborated) by an uncontradicted eulogium, it is possible to infer (or presume) a vidhi (ordinance) as in the case of 'placing above.' Thus, in the matter of *Pretâgnihôtra*[7], the *Sruti*

1. The Sanskrit word is मन्त्रवर्णः

2. Rig Veda Sambita Mardala VII Sukta 4.

3. According to some the reading is स्तुतैः सह instead of स्तुतैः

4. Daughter's in the Telugu edition. The meaning is the same, *i.e.*, the son of the maternal uncle's sister.

5. The grandson (पात्र) *i.e.*, son's son of the father's sister's father.

6. Another reading is विरोधिवचनानमभावात् । मातुसपिण्डाविषयत्वस्यैवार्णित्वात् च ॥ The meaning then is ' and as there are no texts contradicting (this) and as such texts have been explained to relate to girls who are sapindas of the mother.

7. Purva Mimamsa, Adhyaya III, Pada IV, Adhikarana V (Vartika 15).

says:—"He shall follow, placing the *samith* (sacrificial stick used as fuel) at the bottom, for indeed it is placed at the top in the case of *devas*." Here having ordained the placing of the *samith* with incantation of *mantra* beneath (*i.e.*, in the lower portion of) the oblation (relating or) sacred to the Manes, (it is stated) in the rest of the same sentence that in the offerings to Devas the placing of the *samith* is above the oblation. The question is: Is this (latter) a eulogium or an ordinance? As to this the objector's argument is that it is a eulogium because it states the same as the vidhi by reason of its praising the vidhi "placing under." It would be proper to extol (one fact) by reiterating a well-known fact. 'Placing above' is not a well-known fact anywhere and consequently cannot be used to extol (another fact), and therefore it being new matter is to be construed as a vidhi (an ordinance), even though it has to be admitted that the sentence has to be split. Similarly, with reference to the text "may we meet at the third generation" and others by the fact of their laying down new matter an ordinance that one shall (?) marry one's maternal uncle's daughter is inferred. Therefore, this marriage is sanctioned by *Sruti.*[1] And it has been shown that *Smritis* allow the marriage of the maternal uncle's daughter by causing cessation of *sapindaship* in forms of marriage (of mother) beginning with the *Brahma.* And the practice of good men of the South has been quoted as blameless.

But some are of opinion that the marriage of the maternal uncle's daughter is conformable to law (dharmya) in particular countries even with respect to forms of marriage (of mother) beginning with the *Âsura.* And they also quote the (following) texts:—Amongst them *Baudhayana,*[2]: "There is difference in five matters—In the south eating with one whose *Upanayana* *has not been performed, and with one's wife; eating stale (or not fresh) food and marrying maternal uncle's daughter and father's sister's daughter. And similarly in the North, selling wool; drinking spirits; dealing in animals having a double row of teeth[3]; living by arms, and sea voyage. One (man) practising [* 513]

1. The Calcutta Edition reads *sastra* instead.
2. Baudhayana Prasna I, Adhyaya I, Kanda ii § 1 and 2 to 6. Sacred books of the East, Vol. XIV, Part 2, page 146.
3. Such as horses, &c.

(them) in the other (country) becomes blameable and so, that other in (this) one, owing to the authority of the (practice of each) country." 'One,' *i.e.*, the southerner, 'in the other,' *i.e.*, in the northern country, contracting connection by marriage with a maternal uncle, becomes blamable; but not in his own country. Similarly 'That other,' *i.e.*, a northerner, 'in (this) one,' *i.e.*, in the southern country, drinking spirits and doing other acts, is blamable, but not in his own country. Why? "Owing to the authority of the country." The meaning is the authority of conduct (of virtuous men) is confined to the country (in which such conduct is regarded as authoritative.) And thus *Devala* :—"It is stated in the Smriti[1] that what is fixed as lawful conduct in a certain country, that conduct should be followed in that country but not in another country." Bhrigu (states)[2]: Whatever may be the law (dharma) fixed in a country, town or village or in a city (of people) versed in the three Vedas, that law should not be disturbed." But if the conduct of good (men) is to be taken as an authority, marrying one's daughter would also become possible, for *Prâjapati* did so. So runs the *Sruti*[3]: "*Prajapati* coveted his daughter." Not so, for the rule is "do not follow the conduct of *devas*." Therefore *Baudhayana* says[4] :—"What has been done by *devas* and by *rishis*, should not be followed by men: they (men) should only do an act ordained (or stated) for them." Thus the marriage of maternal uncle's daughter is established[5] by the very ordinance "who is not (his) *sapinda*" &c., by limiting it to (*female offspring* of women married in) the forms beginning with the *Brahma* stated already and by restricting it to particular countries.[6]

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1. Telugu Edition reads instead "Bhrigu directs." 2. Some omit this.

3. Aitareya Brahmana III. iii § 33. See the explanation of this Sruti by Kumarilla Bhatta. 4. 1, 1, 2 § 12.

5. The Telugu Edition has "well-known" instead.

6. Madhava in his Jaiminiya Nyaya Mala expresses himself opposed to this marriage. [This is, however, a mistake. He is stating there the opinion of Kumarilla Bhatta in his Tantra Vartika. Kumarilla's argument is that there is a Sruti prohibiting a maternal uncle's daughter's marriage. From the Achara favouring such marriage, a smriti ordaining such marriage may be inferred. From this inferential Smriti a Sruti may be presumed. But such inferential Smriti and Sruti cannot be presumed when there is an express Smriti prohibiting such marriage. Madhava's argument here is that there is an express Smriti favouring such marriages (see his explanation of the text "Who is not his sapinda, &c") and that no question arises as to a Smriti having to be inferred from conduct or usage. The rule of construction is that as between a *Pratyaksha* Smriti and an *Anumana* Smriti the former will prevail and not the latter :—Ed.]

"**Junior**" *i.e.*, less in age and size of body. On the inferiority of years Manu states[1] how much (she should be younger in age)—"Let a man of thirty years wed an agreeable maiden of twelve: or let a man of thrice eight years wed a maiden of eight, * when hurried owing to religious rites being lost." Also [*514] *Brihaspati*:—"A man of thirty years should take to wife a maiden of ten years *who has not attained puberty* or a man of twenty-one may take one of seven years." Also in *Vishnu Purana*[2]:—"One should take to wife (a maiden) whose age is to his as one is to three."

"**Free from disease**"—*i.e.*, free from incurable diseases such as consumption.

"**Who has brother**"—*i.e.*, one who has a brother, elder or younger. By this (any) doubt as to her being a *putrika* (appointed daughter) is rejected (excluded). Therefore *Manu* says[3]:—"Her who has no brother, or whose father is not known, a wise man should not marry for fear she might be of the nature of a *putrika*." ("Or whose father is not known" *i.e.*)—She whose father's intention to make her a *putrika* (appointed daughter) or not is not known should not be married. The implied sense (अभिप्राय) is that, where no such doubt arises, a man may marry (a maiden) even though she has no brother. By saying "or whose father is not known" it is to be inferred that a maiden daughter becomes a *putrika* by mere resolve on the part of the father without any understanding with the bridegroom. And so *Gautama*[4] says:—"In the opinion of some, one becomes a *putrika* by mere resolve; for fear of it, one should not marry a brotherless (maiden)." Also *Manu*[5]:—"A sonless man may make his daughter a *putrika* by this formality:—The child that is born to this woman, may it be the offerer of *svadha* (funeral oblation) to me." If an arrangement be made with the

1. Ch IX, § 94. Sacred Books Vol, XXV. p. 344.
2. III, Ch. 10, § 15.
3. Ch. III, § 11. Sacred Books, Vol. XXV p. 77. [There are various interpretations placed upon this verse. It is not necessary to discuss them here. Madhava's interpretation is different from any of these.—Kullukabhatta states that this verse does not shew that a *putrika* may be made by mere resolve of the father and not by arrangement with the bridegroom:—ED.]
4. Sacred Books Vol. VI, Part 1, Ch. 28, § 19 and 20 pp. 301, 302.
5. Ch. IX, § 127, Sacred Books, Vol. XXV p. 352.

bridegroom, the appointment of a *putrika* is clearly known. This arrangement is shown by *Vasishta*[1] :—" I shall give you (this) maiden adorned, who has no brother: the son that is born to this woman, may he be *my* son." The reading, according to some, is " may he be *our* son." In the case of this *putrika* also, as in the case of the forms of marriage beginning with the *Gandharva*[2], her relation with her father and others as *sapinda* and *sagotra* does not cease. Hence, *Lougâkshi* says :—" The son of a *putrika* should offer *pinda* and water to his mother
[* 515] *as belonging to the *gotra* of his maternal grandfather: so says *Prajapati*." Hence, one who suspects the case of a *putrika* as detailed above, and desires to have sons (of his own) should marry only one who has a brother.

" **Not born of the same arsha and gotra.**"—"*Arsha*" *i.e.*, belonging to a *rishi*, *i.e.*, *pravara*. This means the group of *rishis* differentiating from the *rishi* who is the founder (or originator) of the *gotra*. For instance, *Ângirasa* and *Brihaspati* are *rishis* differentiating from *Bhâradvâja* the originator of the *gotra*: hence (people) make use of (the following expression)—" I am of *Ângirasa*, *Bârhaspatya*, *Bhâradvâja gotra*." So should other instances be construed. *Gotra* is well-known as the line of descent (*Vamsaparampara*). The bride who is not of the same *gôtra* or *pravara* as the bridegroom is fit for marriage. In some cases although there may be difference of *gotra* there is sameness of *pravara*. For instance: those who belong to different *gotras* such as *Yâjñavalkya*, *Vâdhula* and *Mauna* and *Mauka*[3] have the same *pravara*—*Bhârgava*, *Vîtahavya*[4] and *Sâvetasa*. Hence, in the contingency of marriages (among them) in order to forbid such (inter) marriages, it is said " one who is not born of the same *ârsha* (*pravara*)." In some cases although there may be difference of *pravara* there is sameness of *gotra*. For instance in " *Ângirasa*, *Ambarîsha*, *Yauvanâsva*" and in "*Mândhâtri*, *Ambarîsha*, *Yauvanâsva*," though there is difference of *pravara* with respect to *Ângirasa* and *Mândhâtri*, the gotra *Yauvanâsva*

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1. Sacred Books Vol. XIV, Part 2, Ch. 17 § 17 p. 86.

2. [*i.e.*, as the connection of Sapinda and Pravara of the father does not cease in the case of a maiden married in the Gandharva, &c. forms :—ED.]

3. For मौनमौकानां another reading is सौनकानां.

4. Strictly Vaitahavya.

is the same. Hence, to forbid marriages in such cases, [difference of *gôtra* is mentioned.[1]] The originators of *gôtrâs* are chiefly eight *rishis*,—the seven *rishis* with *Agastya* as the eighth. Thus *Baudhayana* says:—[" *Visvâmitra*, *Jamadagni*, *Bhâradvaja Gautama*, *Atri*, *Vasishta*, *Kasyapa*—these are the seven rishis. The offspring of these seven rishis who have Agastya as the eighth are said to be of their *gotras*."] Even in another smriti (it is said[2]:—" *Jamadagni*, *Bhâradvaja*, *Visvâmitra*, *Atri*, *Gautama*, *Vasishta*, *Kasyapa* are rishis who are the authors (or originators) of *gôtrâs*. Their offspring are considered to be of their *gôtrâs*." Of these *gôtrâs*, the sub-divisions are a thousand (innumerable); but their groups are forty-nine. Thus *Baudhayana* :—" There are thousands, millions, and ten millions[3] of *gôtrâs* ; their *pravaras* are forty-nine as stated by *rishis*." The sameness and difference of *gôtrâs* and *pravaras* are well known by (may be well understood from) the pravara works of *Baudhâyana*, *Kâtyâyana*, *Visvâmitra*, *Garga* and others. Nor should it be suspected that the sameness of *gôtrâ* and *pravara* together is the cause of exclusion, for each of them (separately) is stated to be blameable. Thus *Baudhayana** says[4]:—" Should he unknowingly marry a [* 516] female of the same *gôtrã* he should maintain her as (his) mother." Also *Satatapa*[5] :—" Marrying a woman of the same *gôtrâ* or of the same *pravara*, one should abandon her, the expiation is *Taptakrichhra*." *Apastamba* :—" Having married a maiden of the same *gôtrâ* and *pravara*, having had connection with her and having raised children on her[6], one even ceases to be a *Brahmin*."

C. C.

CRITICAL NOTES,

Vishvanath Chardu Naik *v.* Subraya Shivappa Shetti.—I. L. R. 15 B. 290.—The decision in this case is of considerable importance with regard to one of the questions decided,

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1. The Telugu Edition has " it is said one not born of the same *gotra* and *pravara*."

2. Some readings omit all the passages within square brackets.

3. अर्बुद :—The proper meaning is *koti* or ten millions. Monnier Williams states it is hundred millions.—ED.

4. Sacred Books Vol. XIV, Part 2, page 216.

5. Telugu Edition, Ch. 5. § 3.

6. Instead of तस्यांमुत्पाद्यसन्तानं others read तस्यामुत्पाद्यचण्डाल. According to this the meaning is having raised (offspring) (who are regarded as) chandala.

as it is of frequent occurrence. The material facts may be very briefly stated as follows. Plaintiff was the purchaser of the right, title and interest of one H. K. Saheb in certain lands sold in execution of a mortgage decree obtained against H. K. Saheb by one Vitoba. When the lands were attached by Vitoba, the defendants objected to the attachment on the ground that they held them on a permanent lease. The Court, after inquiry, allowed the claim, and ordered the property to be sold, subject to the defendant's right over them. In the proclamation of sale, however, the Court stated that the claims of the intervenors were not vouched for. The plaintiff, having purchased the lands at the auction sale, sued, more than one year after the date of the order on the claim petition, to recover possession from the defendants. The defendants contended before the High Court—(1) that the plaintiff, having purchased the land subject to their permanent lease, was estopped from subsequently denying it ; (2) that more than one year having elapsed since the date of the order allowing their claim, the suit was barred by limitation. The Judges (*Birdwood* and *Parsons* JJ.) overruled these contentions, but on different grounds with regard to the second question. On the first question, *Birdwood* J. observed that there was no estoppel in the case because " in the proclamation of sale, it was expressly stated that the Court did not guarantee the title of intervenors." *Parsons* J. held that the statement of the claims of intervenor cannot bind the purchaser, they being
[* 517] inserted for his benefit. On the second question **Birdwood* J. held that as an order under S. 283 [New Code, O. XXI, R. 63] is conclusive unless set aside within one year, only as against "the party against whom an order under Ss. 280, 281, or 282 [New Code, O. XXI, Rr. 60-62] is passed," the purchaser was not bound by it. He held that " the purchaser at a Court sale is not a party, or the representative of a party within the meaning of S. 244, C. P. C." [New Code S. 47] and disagreed with the District Judge, who held that " the plaintiff is bound by the order as he must be taken to be an *ex post facto* party to the execution proceedings, who failed to sue within a year from the date of the order." Mr. Justice *Parsons* took a different view on this question. He held that the adjudication on the defendant's claim was unauthorized under Ss. 280 to 282, C. P. C., as

they do not provide for a case where an occupancy right is claimed. But he was of opinion that the purchaser *was* the representative of the judgment-debtor. He says: "On his (*i.e.*, the purchaser's) purchase, he steps into the place of the former owner of the property, and it is quite open to him to exercise and use all the rights and remedies that the owner had." The learned Judge is, no doubt, quite right in observing that the question whether an intervenor has a permanent lease-hold interest in the lands attached is not one falling within the provisions of Ss. 280 to 282, C. P. C[1]. The order, therefore, allowing the claim could not be said to be legally valid as against the judgment-debtor. As the owner himself was not bound by the

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1. [It does not appear clear why the question whether an intervenor has a permanent lease-hold interest is not one falling under Ss. 280-282, C. P. C. Apparently these sections are not very happily expressed and the observation of the learned Judge may be due to this circumstance. But the question that has to be remembered is whether a landlord's interest in immoveable property is attacheable. Surely it is not exempt from attachment under S. 266, C.P.C. If a person has only such interest and the right of occupancy is vested in another, is not such latter entitled to intervene when the creditor attaches the whole interest? If the attachment affects the occupancy right of the tenant, why should not the occupancy-holder be entitled to put in a claim under S. 278 and get an order that his interest is not attachable? The analogy of the mortgagee in possession seems to be in point. In the latter case the equity of redemption is attachable at the instance of the judgment creditor. But if the latter attaches the whole property the mortgagee, as his interests are affected, is entitled to intervene and get the attachment released so far as his mortgage right is concerned. If the language of S. 280 is to be literally interpreted, in such a case the only order to be passed by the Court is to direct the release of the property from attachment as the property is in possession of the mortgagee in his own right and not in trust for the judgment-debtor. S. 282, C. P. C., will not govern such a case as apparently it is confined to mortgages or charges which do not pass the possession to the mortgagee. S. 280 refers to the case of a tenancy and enacts that if property is not in the occupancy of a tenant or other person paying rent to the judgment-debtor the Court may release the same. But both these sections contemplate the case of a tenant who is other than the intervenor. If the tenant himself is the intervenor these sections can have no application. S. 278, C. P. C., is the section which allows a claim in execution. The language of the section is wide enough to include the point under consideration. S. 279 also affirms this view. Ss. 280 to 282 refer to the orders which a Court may pass in a claim proceeding, but these are not exhaustive. It may be that if an order is not one coming under these sections the finality imposed by S. 283 will not have operation given to it. So that the order may be questioned at any time and a suit may be brought in spite of the order. It will follow that such a suit need not be brought within the year prescribed by Art. 11. of the Limitation Act:—ED.]

summary order, the learned judge held that the purchaser also was not. Mr. Justice *Parsons'* view, therefore, is not in agreeme n with that of Mr. Justice *Birdwood*, that a purchaser is not bound by the order against the judgment-debtor. We shall now examine somewhat fully the correctness of Mr. Justice *Birdwood's* view that the purchaser does not stand on the same footing as the judgment-debtor with regard to orders under Ss. 280 to 282. Before doing so, we may be permitted to observe that *Birdwood* J., to some extent, wanders from the real point when he says: "A purchaser at a Court sale is not a party within the meaning of S. 244, C. P. C." The real question is not whether he is a representative within the meaning of S. 244, for in the first place it may be doubted whether it is at all a question relating to the execution of the decree what right a sale confers on the purchaser; secondly, even supposing that it is so, and that the purchaser stands in the judgment-debtor's shoes, the question is one not between the judgment-debtor and the judgment-creditor, but between the judgment-debtor and creditor on the one hand, (their interests in this respect being identical) and the claimant on the other. The real point in issue is whether under S. 283, the order became conclusive against the purchaser, by his failing to set it aside within one year. That section enacts that a "party
[* 518] against whom an order* is passed" should set it aside if so advised, within one year. An order allowing the claim, is of course, against the judgment-debtor inasmuch as it cuts down his rights in the property attached[1]. There can be no doubt that the order equally affects any representative in interest of the judgment-debtor, as for instance, one who purchases or inherits from him. Does it also affect a purchaser at an auction sale? Or, in other words, is such a purchaser the representative in interest of the judgment-debtor? Notwithstanding some authorities to the contrary, it is submitted that he is. Suppose an intervenor claims an interest in the property attached, and the claim is decided against him, and the property is afterwards sold by auction, can the intervenor sue the purchaser after the expiry of a year from

1. [We should say that the judgment debtor is not necessarily a party to the order. Whether he was a party to the order would depend on the circumstances under which the order was made and the terms of the order itself. *See Muthusawmy Mudaly* v. *Ayyalu Bathadu*: (1902) 13 M. L. J. 367 (368):—ED.]

the date of the order? Can he say that S. 283, C. P. C., compels him to institute a suit to establish his right to the property attached, only as against the parties to the order, and that as the purchaser was not a party to the order, a suit against him is maintainable after the expiration of a year? It seems to us to be clear that the answer must be in the negative; that equally against the purchaser and against the judgment-debtor and judgment-creditor, the suit, if any, to set aside the summary order must be instituted within one year; otherwise, S. 283 will practically be inapplicable as against an unsuccessful intervenor, where the property has been subsequently sold, except where the judgment-creditor himself is the purchaser. This could not have been the intention of the legislature. If, then, an intervenor cannot sue an auction-purchaser for a declaration of his right in the property attached after one year, the principle of mutuality requires that the purchaser should be equally precluded from suing the intervenor when his claim is allowed[1]. To use the words of *Parsons* J., the purchaser "stands in the shoes of the judgment-debtor," and his rights and liabilities ought, as a rule, to be co-extensive with those of the latter. It cannot be disputed that the purchaser purchases only the right, title and interest of the judgment-debtor as it stood at the date of the attachment, or in the case of a mortgage decree, at the date of the mortgage [or, we may add as is directed by the order in claim proceedings.—ED.] If before the attachment, the judgment-debtor had made any alienation of the lands, it would be equally binding on the purchaser.[2] To this rule, no doubt, there is one exception, *viz.*, any alienation made by the judgment-debtor to defraud his creditors will be invalid aginst creditors and purchasers at auction, though he himself may be estopped from denying their validity. There may also be instances where even in the absence of an intention to defeat creditors, the alienation may be invalid as against creditors and purchasers under the law of bankruptcy. But with these exceptions, it is submitted that the right of the purchaser

1. [When the claim is allowed the property cannot as a matter of fact be sold so as to affect the claim so allowed; only what is left after what has been allowed for the claimant is sold, and so there can be no conflict between such a purchaser and the claimant.—ED.]

2. [It does not appear who the claimant was and when the claim was made.—ED.]

[* 519] *are those of the judgment-debtor, and that this follows necessarily from the principle that what is bought by the purchaser is the right, title and interest of the judgment-debtor. Admissions made by the judgment-debtor before the date of attachment ought, therefore, to be equally valid against purchasers. Being made by him at a time when he had an interest in the property, and no interest adverse to the purchaser, and the right purchased being the right of the judgment-debtor, the admission possesses all the safeguards of truth and fulfils all the requisites necessary to make it admissible against the auction-purchaser. It is also submitted that when the judgment-debtor, by any act of his, is estopped from denying the title of another, as when he has induced him to buy property as that of a third person, while it really belonged to himself, a purchaser at auction sale would be as much estopped as a private purchaser without notice of his vendor's conduct. S. 115 of the Evidence Act seems equally to cover the case of both.

We shall now briefly refer to the cases in which the question, whether the purchaser is or is not the representative in interest of the judgment-debtor, arose for decision. In *Khenum Kuree Chowdhrain* v. *Gour Chunder Mojoomdar*[1], Justices *Norman* and *Campbell* held that an admission by a judgment-debtor after an auction sale of his properties is not binding on the purchaser at the auction sale. "It is a common and well-known principle of the Law of Evidence," observed their Lordships, "that the admissions of a former owner of property, made after he has ceased to have any interest, are not evidence against the party in possession." Their Lordships do not seem to have conceived any distinction between an auction-purchaser and a purchaser at a private sale, or doubted that the admission would be admissible if made before the sale. In *Rungo Monee Debia* v. *Raj Coomaree Bibee*[2], *Loch* and *Norman* JJ. held that a judgment against the former owner is not binding on an auction-purchaser. A Hindu widow obtained against the former owner a decree for a portion of the maintenance due to her from her husband's co-parceners, as if it were a charge on the property in the possession of the former owner, while it really was not. Their Lordships refused to hold that the decree was binding on the auction-purchaser, and incidentally observed that an auction-purchaser would not be bound also by an admission of the judgment-debtor. They treated the decree as not affecting the

1. (1865) 5 W. R. 268. 2. (1866) 6 W. R. 197.

property, but only the former owner personally, and distinguished the case from *Boykuntnath* v. *Ameeroonissa*[1], in which *Bayley* and *Norman*, JJ. held that a decree deciding boundary disputes between the former owner and another was binding on the auction-purchaser. If their Lordships were right in holding that the decree was not against the property, which seems doubtful, the decision is really of no consequence* with reference to the present [* 520] question, but if the decision did bind the property, then their Lordships showed no inclination to differ from the case in *Boykuntnath* v. *Ameeroonissa*[1], which is in favor of the view that the purchaser is the representative of the judgment-debtor. In *Musammat Imrit Kooer* v. *Lalla Debee Pershad Singh*,[2] *Couch* C. J. and *Ainsle* J. held that an admission by the judgment-debtor is admissible in *evidence* against a public purchaser, but not absolutely binding on him, but the case was one in which the admission would not have estopped the judgment-debtor himself, if he had been a party to the suit. It is difficult to see how the admision could be evidence against the puchaser unless he were the judgment-debtor's representative in interest. In a later case, *Unnopoorna Dassee* v. *Nufur Poddar*[3], *Markby* and *Birch* JJ. distinctly held that an auction-purchaser is the representative in interest of the judgment-debtor, and that, therefore, an admission made by the latter was admissible in evidence against the former. Their Lordships said : "We do not know of any construction which could be put upon that somewhat vague expression which would exclude him (*i.e.*, the auction-purchaser)." In *Aunath Nath Deb* v. *Bishtu Chunder Roy*,[4] *Garth* C. J. and *Tottenham* J. held that a mortgagee who claimed the estate of his mortgagor as an auction-purchaser in a suit to enforce his mortgage would be estopped under S. 115, Evidence Act, from disputing that the property belongs to a third person when the mortgagor himself would be. The next important case is *Lala Parbhu Lal* v. *Mylne*.[5] *Tottenham* and *Ghose* JJ. who decided the case, apparently approved of the decision in *Aunath Nath* v. *Bishtu Chunder Roy*[4] that a mortgagee who is the purchaser of the mortgagor's estate at auction will be estopped by whatever estops the mortgagor, but they were of opinion that the principle would

1. (1865) 2 W. R. 191.
2. (1872) 16 W. R. C. R. 200.
3. (1874) 21 W. R. 148.
4. (1878) I. L. R. 4 C. 783.
5. (1887) I. L. R. 14 C. 401.

not apply to the case of one who merely purchases a judgment-debtor's interest at an auction sale. They said: "We are aware of no authority for holding that the simple fact of purchase at an execution sale will make him the representative for the purpose of that section (*i.e.*, S. 115, Evidence Act) of the judgment-debtor. On the contrary, the execution-purchaser derives his title adversely to the judgment-debtor." Three cases are relied on in support of this view—*Dinendronath Sannyal* v. *Ramcoomar Ghose*,[1] *Musammat Imrit Kooer* v. *Lalla Debee Pershad Singh*[2] and *Srimati Anand Mayi Dasi* v. *Dharandra Chandra Mookerjee*.[3] The first of these cases merely decides that while, under a private sale, the purchaser cannot acquire a better title than the judgment-debtor himself has *on the date of sale*, under an execution sale, the purchaser acquires the judgment-debtor's right freed from all alienations and incumbrances effected by him
[* 521] *after *the attachment* of the property sold. It does not in any man-go against the proposition that the title of an execution-purchaser is no better than that of the judgment-debtor at the date of the attachment. The second case relied on has been already referred to. It holds that an admission made by the judgment-debtor before the attachment is evidence against the purchaser, but not absolutely binding on him. The third is a Privy Council case. It has really no bearing on the point in question. The plaintiff was a purchaser at a sale in execution of a mortgage decree, and the defendant, a purchaser, apparently in execution of a money-decree, the property having been attached for the defendant's debt in execution before the date of the mortgage which was the basis of the plaintiff's title. Their Lordships having held that the defendant's title was superior to the plaintiff's, proceeded to observe that even otherwise, the defendant having been in possession for 12 years under his sale, the suit was barred by limitation, and that in this respect his position was not the same as that of one claiming under a voluntary alienation from the mortgagor. "They are of opinion that the possession of a purchaser under such circumstances is really not the possession of a person holding in privity with the mortgagor, or holding so as to be an acknowledgment of the continuance of

1. (1881) L.R. 8 I.A. 65; I.L.R. 7 C 107. 2. (1872) 18 W. R. C. R. 200,
3. (1871) 8 B. L. R. 121 s.c. 14 M. I. A. 101.

the title of the mortgagee. The possession, which the purchaser supposed he acquired, was a possession as owner, &c." It does not seem that their Lordships of the Privy Council intended to make any distinction between a purchaser by private sale and one at a Court sale, but only as between one holding *under* or *subordinate* to the mortgagee and one holding as *owner*. Even if any such distinction was intended for the purposes of limitation, it does not appear to follow that their Lordships meant to lay down that a purchaser at a Court sale takes anything more than the rights of the judgment-debtor, or that he is not the "representative in interest" of the judgment-debtor. The cases relied on do not, therefore, go far to support the conclusion arrived at by the learned Judges. They dissented from a prior unreported decision of a Division Bench. One other decision of the Calcutta High Court deserves to be noticed, *viz.*, *Gour Sundar Lahiri* v. *Hem Chunder Chowdhury*.[1] In this case while a suit to enforce a mortgage was pending, the plaintiff purchased, in execution of a decree for a simple money debt, some of the mortgaged properties. The mortgagee after obtaining his decree died. One *G*, alleging himself to be the assignee of the decree from the representative of the mortgagee, got himself brought on the record as decree-holder under S. 232, C. P. C., and proceeded to attach some of the mortgaged properties. The plaintiff put in a claim petition but it was rejected. *He then filed the suit to declare that the proper- [* 522]
ties purchased by him were not saleable in execution of the mortgage decree. It was contended that the suit was not maintainable as the plaintiff, as a purchaser, was a representative of the judgment-debtor and, therefore, bound by the order under S. 232. *Prinsep* and *Ghose* JJ. held that the plaintiff, not being a voluntary purchaser, was not the judgment-debtor's representative, and that the suit was not barred under S. 244, while they held that another person who purchased some of the other mortgaged properties privately from the mortgagor would be barred under S. 244. The decisions in *Srimati Anundo Moyee* v. *Dhonendro Chunder*[2] and *Dinendronath* v. *Ramcoomar*[3] as well as the decision in *Lala Parbhu Lal* v. *Mylne*[4] were referred to by the judges. It was contended for the defendant that the plaintiff being a purchaser *pendente lite*, he was bound by all

1. (1889) I. L. R. 16 C. 355.
2. (1871) 14 M. I. A. 101.
3. (1881) L. R. 8 I. A. 65: s.c. I. L. R. 7 C. 107.
4. (1887) I. L. R. 14 C. 407.

orders passed against the judgment-debtor, and that it was not necessary to make him a party to them. Their Lordships held, with regard to this contention, that the mortgage decree was barred by limitation and could not, therefore, be enforced against the plaintiff though he purchased *pendente lite*. But had a purchaser *pendente lite* any *locus standi* in the case, or if he had, was it not merely as one standing in the shoes of the mortgagor-judgment-debtor, and if so was he not bound to urge all his objections to the execution of the decree, including the objection of limitation, in the execution proceedings? The decision does not appear to be altogether satisfactory. See *Narain Acharjee Chowdhry* v. *Gregory*[1].

The question has arisen for decision in Allahabad more than once. In *Zauki Lal* v. *Jawahir Singh*,[2] pending a suit for the recovery of certain lands, one *Z* purchased a portion of the lands, and being dispossessed of them in execution of the decree, sued the decree-holders for possession. It appears to have been contended that the suit was barred by S. 244, C. P. C. *Stuart* C. J. and *Straight* J. held that the plaintiff was not the representative of any party in the former suit and therefore the suit would lie. But the plaintiff was a purchaser *pendente lite* of the rights of the defendants in the former suit and was bound by the decision in that suit. There was, therefore, really no question whether the plaintiff was a representative of the defendants in the former suit. S. 333, C. P. C, shows that a purchaser *pendente lite* has no right to resist delivery of possession in execution of the decree pending which he purchases. In *Jagat Narain* v. *Jag Rup*[3] a decree on a first mortgage of certain property not being satisfied, the property was sold in execution of a decree of a later date on the second mortgage of the property. The decree-holder on the first mortgage brought a suit to enforce his decree against the properties purchased by the second mortgagee. S. 244 was pleaded as a bar to the suit. The full Court held that the suit was maintainable as the purchaser was not the represen-
[* 523] tative* of the mortgagor. But here again, the purchaser having acquired his rights *pendente lite*, had no *locus standi* at all, and if he had any, it must be as one standing in the shoes of the

1. (1867) 8 W R. 304. 2. (1882) I. L. R. 5 A. 94.
3. (1883) I. L. R. 5 A. 452.

person whose rights he purchased. The decision could be upheld, however, on the ground that the second mortgagee not being a party to the first mortgagee's suit, the property could not be brought to sale as against him without a fresh suit.

The question is *res integra* so far as the Madras High Court is concerned. In Bombay, also, the case now under consideration is really the only one in point, though in the judgment of *Birdwood* J. *Vasanji Haribhai* v. *Lallu Akhu*[1] is relied on.

In England, in *Chase* v. *Goble*[2] it was held that a judgment-creditor in a writ of *fieri facias* may show that an assignment by the judgment-debtor to a claimant who intervened passed nothing to the intervenor, on the ground that the assignment was an act of bankruptcy. This case is not inconsistent with the view that a purchaser is the representative in interest, generally, of the judgment-debtor; the cases where the judgment-debtor deals with his property by way of assignment or otherwise in order to defeat his creditor, or against bankkruptcy laws, must for obvious reasons be exceptions to the rule.

In *Gadsden* v. *Barrow* [3] an intervenor claimed in an interpleader suit, under a bill of sale. The judgment-creditor proposed to prove that the judgment-debtor had no interest in the property seized in execution at the time of the bill of sale, he having previously executed a bill of sale of the same to another person. *Parke* B. held that he should be allowed to do so, although the judgment-debtor himself would be estopped from doing so, but *Martin* B. did not agree. He observed :—"I do not mean to differ, but certainly the impression on my mind is that the sole question is between the claimant and the judgment creditor, *i.e*, whether the claimant has a title by a valid bill of sale as against the execution-creditor. It seems to me unreasonable that the judgment-creditor should get the goods, when upon his own showing he has no right to them." In *Edwards* v. *English* [4] it was held under similar circumstances that the creditor could not prove what the judgment-debtor could not prove, that he had no interest on the date of the second sale. In *Richards* v. *Johnston* [5] a debtor allowed one *H* to assign the goods as his own to the plaintiff. The goods were seized by

1. (1885) I. L. R. 9 B. 285.
2. (1841) 2 M. & G. 930.
3. (1854) Exch. 514.
4. (1857) 7 Ell. and Bl. 564.
5. (1859) 4 H. & N. 660.

the defendant under a judgment against the debtor. The plaintiff intervened. *Channel* B. reserved the question whether the creditor was estopped from denying that the property was in *H.* The Court, consisting of *Pollock* C.B., and *Martin*, *Watson* and *Channel* BB. held that he was not estopped. *Martin* B. [* 524] said : "It is a general * principle that estoppel does not bind strangers but only parties or privies. The sheriff represents, and is to enforce, the legal rights of the judgment-creditor ; he is to seize the goods of the debtor for the creditor, and is a stranger to an estoppel only affecting the debtor. He seizes by virtue of a purely legal title independently of any estoppel. The creditor claims not 'under' the debtor ; he acts adversely. The jury have found that there was no actual transfer to—and there is nothing to rebut the right of—the execution-creditor." We may observe with regard to the question whether a purchaser is bound by an estoppel affecting the judgment-debtor, that it may be possible to hold that a *bona fide* purchaser from the judgment-debtor will not be estopped by the conduct of the judgment-debtor. It may be possible to hold that a person who is induced to alter his position by the judgment-debtor's conduct derives merely an equitable interest in the property as against the judgment-debtor, and that a *bona fide* purchaser buying in the legal estate from him will not be affected by the estoppel ; in that case, the purchaser at an auction will, of course, also not be estopped.

So far as the authorities are concerned, the English cases are not conclusive either way ; in Calcutta they seem to be conflicting ; in Madras, the question has not received judicial con sideration : and in Bombay, *Birdwood* and *Parsons* JJ. took different views in the case under consideration. It is submitted that on principle there is no ground for making any distinction in cases under notice between a purchaser at a Court sale and a purchaser at a voluntary sale, and that both alike are bound to set aside an order allowing the claim of an intervenor within one year from its date.

[*Auction-purchaser* has now been held to be a representative in Allahabad and Calcutta—see *Gulzari Lal* v. *Madho Ram*[1] ; *Surendra* v. *Gopi Sundari*[2]. For Madras see note at pp. 186, 187 *post*. For Bombay see *Majanlal* v. *Doshi Mulji*[3].—ED.]

1. (1904) I.L.R. 26 A. 447. 2. (1905) I.L.R. 32 C 1031.
3. (1901) I.L.R. 25. B. 631 (635.)

NOTES OF INDIAN CASES. [546]

Shirekuli Timapa Hegade *v.* Ajjibal Narshinv Hegade.—I.L.R. 15 B. 297.—The Bombay High Court *held* in *Kalidas Kevaldas* v. *Nathu Bhagvan*[1] that when several persons were jointly entitled to some relief, but only some of them sued in the first instance, the whole suit would be barred, if at the time that the rest joined as plaintiffs the suit was time-barred. See also *Ramsebuk* v. *Ramlall Koondoo*[2]. The decision in *Shirekuli Timapa Hegade* v. *Ajjibal Narshinv Hegade* softens the rigour of this rule by holding that if the defendant raised no objection as to non-joinder, but the Court, on the application of certain strangers, finding them jointly entitled, directed them to be made co-plaintiffs, the original plaintiffs would not be barred, even though the latter were, under S. 22 of the Limitation Act. [The objection of misjoinder of plaintiffs if not taken in the Court of first instance will not be allowed to be taken in the appellate Court. See *Fakirapa* v. *Rudrapa*[3] :—ED.] S. 34 of the Code of Civil Procedure which declares that any objection for non-joinder of parties shall be deemed to have been waived if not taken before the first hearing seems to have led to the decision. [The latter principle was also applied to a case where the objection was raised only at a late stage[4]:—ED.]

Parashram Jethmal *v.* Rakhma.—I. L. R. 15 B. 299.—In this case *Telang* J. discusses the old question whether Act XIV of 1859 extinguished the right in addition to barring the remedy. The decision also throws some light on the question which may possibly arise in Madras whether a Hindu undivided brother against whom a decision has been passed by a Magistrate *under the Criminal Procedure Code with regard to possession [* 547] of immoveable property, could maintain a suit for partition after the lapse of three years from the date of the Magisterial order. *Telang* J. would seem to hold that he could.

Parvata *v.* Digambar.—I.L.R. 15 B. 307.—The decision in this case proves this: that an oral assignment of a decree is invalid, a rule of substantive law in the Code of Civil Procedure. [See also *Javermal* v. *Umaji*[5] ED.]. The assignee can only claim relief by execution of the decree, for a second suit by the assignee

1. (1883) I. L. R. 7 B. 217.
2. (1881) I. L. R. 6. C. 815.
3. (1891) I. L. R. 16 B. 119. (122.)
4. *Guruvayya Gouda* v. *Dattatraya Anant.* (1903) I. L. R. 28 Bom.11 at p. 19.
5. (1884) I. L. R. 9 B. 179.

against the judgment-debtor will not lie. See *Ram Bakhsh* v. *Panca Lal*[1]. As the executing Court will not recognize an oral assignment, the assignment itself becomes invalid. Even with regard to an assignee in writing, the provision in S. 232 is not satisfactory. It is within the discretion of the Court to recognize or not the assignment. He may have his right as assignee declared by regular suit, and even then the Judge of the executing Court is not bound, under the terms of the section, to recognize him, nor is there an appeal against his order.[2] There is also the hardship of the assignee not being in a position to deduct the time during which he is seeking to establish by regular suit his right as assignee, from the period prescribed for applications for execution.

Javerbai v. Kablibai.—I.L.R. 15 B. 326.—In this case several questions of importance were decided by *Farran* J. sitting as a single Judge on the original side. A Hindu by his will granted a life-estate to his widow, with remainder to the male issue, if any there be, of his brother and, in default of male issue, to his brother in trust for such persons as he may appoint. The learned Judge first held that the bequest in favour of male issue to be born between the date of the will and the death of the life-tenant was void as opposed to the *Tagore case.* [This point was upheld on appeal. See *Javerbai v. Kablibai*[3] :—ED.] The male issue who were intended to take were those that were alive at the death of the life-owner, not of the testator (*vide* S. 98 of the Indian Succession Act which lays down a rule of construction in force even before the Act). The judge also held that the gift in favour of the brother was not void on account of the intermediate estate becoming void, because the

1. (1885) I.L.R. 7 A. 457.

2. The decisions are now to the effect that an appeal lies. See *Virasami* v. *Bodi* (1900) I. L. R. 25 M. 384 (*n*) ; *Subbathayammah* v. *Chidambaram* (1901) I. L. R. 25 M. 383. *See* also *Manikkam* v *Tatayya* (1894) (I.L.R. 21 M. 388 ; *Badri Narain* v. *Jai Kishen* (1894) I.L.R. 16 A 483 ; *Sabhajit* v *Sri Gopal* (1894) I.L.R 17 A. 222; *Dwar Buksh* v. *Fatik* (1898) I L R. 26 C. 250. Cf. also *Tumeshar Prasad* v. *Thakur Prasad* (1903) I. L. R. 25 A. 443 (445). Piror to Act VII of 1888 amending S. 244, C. P. C., the decisions were the other way although the Bombay High Court even then took a different view. See *Ramchandra* v. *Mahadaji* (1884) I. L. R. 9 B. 141. But see *Sambasiva* v. *Srinivasa* (1889) I.L.R. 12 M. 511; *Mohabir* v. *Ram.* (1884) I. L. R. 11 C. 150; *Halodhar* v. *Harogobind* (1885) I. L. R. 12 C. 105 ; *Jagat Narain* v. *Jag Rup.* (1883) I.L.R. 5 A. 452 ; and *Behari* v. *Ganpat* (1887) I.L.R. 10 A. 1.—ED.

3. (1891) I. L. R. 16 B 492 at pp. 496, 497,

gift over to him came into force immediately on the death of the tenant for life if he had no male issue at that time—*Kumar Tarakeswar Roy* v. *Kumar Shoshi Shikhareswar*[1]. It was not a limitation expectant on a devise invalid for remoteness. [Also upheld on appeal[2].—ED].

The next proposition laid down by the Judge was that a power of appointment was unknown to the Hindu law. [This view was upset on appeal[3] and it is now settled law that powers of appointment are valid under the Hindu Law : *Bai Motivahu* v. *Bai Mamubai*[4] :—ED.] Where there is no gift over in default of appointment such a power confers an absolute estate. The learned Judge has not discussed the last question with that fulness which it deserves. [This view was upset on appeal[5] :—ED.]

Patloji v. Ganu.—I. L. R. 15 B. 370.—This case decides a simple question. When an appeal is withdrawn, the original decree stands. And if it is a redemption decree which limits the time for payment to six months from the date of the decree, the fact that an appeal had been filed and withdrawn would not extend the time. [See also *Chudasama* v. *Mahant Ishwargar*[6].—ED.] This decision has been followed in Madras by *Parker* J. in C. M. S. A. 59 of 1890 : *Kanara Kurup* v. *Govinda Kurup*[7]. The view that where an appeal is withdrawn there is no appellate decree is controverted in *Jeeyangar* v. *Lakshmidas*[8] which is not a case of a mortgage-suit. The view taken in this case is that even in cases where an appeal is withdrawn the period of limitation under Art. 179, Cl. (*i*), for execution of the decree runs only from the date of the order of the appellate court allowing the withdrawal and finally disposing of the appeal[9]. Of course this does not affect the more important question whether the six months run from the date of the appellate decree or that of the original decree, when the appellate court has merely confirmed the decree of the *original court. *Parsons* J. says that all the courts [* 548]

1. (1883) I. L. R. 10 I. A. 51.
2. (1891) I. L. R. 16 B. 492 at p. 497.
3. *Ibid* at pp. 498, 499.
4. (1897) I.L.R. 21 B. 709 s.c. 24 I.A. 93.
5. (1891) I.L.R. 16 B. 492 at 499, 500.
6. (1891) I.L.R. 16 B. 243.

[7. (1892) I. L. R. 16. M. 214 where the judgment of *Parker* J. was appealed against under the Letters Patent. The Division Court reversed it on the ground that the appeal was not wholly withdrawn and that there was an appeal decree :—ED.]

8. (1906) 16 M. L. J. R. 393.

9. But see *Abdul Rahiman* v. *Maidin*: (1896) I. L. R. 22 B. 500 at p. 506 and the cases therein cited.

agree that time would run from the date of the appellate decree and refers to *Daulat* v. *Bhukandas*[1]; *Noor Ali Chowdhuri v. Koni Meah*[2]; *Rupchand* v. *Shamshul Jehan*[3] and other cases. The contrary view has, however, been expressed in Madras (C. M. S. A. 20 of 1890. [See *Kanara Kurup* v. *Govinda Kurup* [4]:—ED.] The question is: does the appellate decree supersede the original decree even when the latter is confirmed? [It seems to be now settled that in cases where the appellate court confirms the decree of the lower court the time granted by the latter court for redemption is not to be calculated from the date of the appellate decree but only from the date of the decree of the original court notwithstanding the appeal, unless the appellate court by its own decree provides a fresh time for redemption.[5] It is open to the first court passing the redemption decree to extend the time for redemption if proper cause is shown.[6] It would seem that the application for extension could even be made to the appellate court,[7], although there seems to be a considerable body of authority against this view[8] and the cases holding this view may be easily explainable.—ED.]

A difficulty [similar to the one already considered in connection with mortgage-decrees] has arisen with respect to the power to amend a decree under S. 206. Is the appellate or the original court to amend it where it has been confirmed in appeal? The Madras High Court held in one case—*Sundara* v. *Subbanna*[9]—that the original court had the power. [It is now settled that it is only the appelate court that has this power of amendment,[10]

1. (1886) I. L. R. 11 B. 172.
2. (1886) I. L. R. 13 C. 13.
3. (1889) I L. R. 11 A. 346.
4. (1892) I. L. R. 16 M. 214.
5. *See Mana Vikraman* v. *Unniappan* (1891) I. L. R. 15 M. 170; *Faijuddi Sardar* v. *Asimuddi* (1907) 11 C. W. N. 679. Cf. *Ramaswami Kone* v. *Sundara Kone* (1907) I. L. R. 31 M. 28.

6. *Mana Vikraman* v *Unniappan* (1891) I.L.R. 15 M. 170; *Vedapvratti* v. *Vallabha* (1902) I. L. R. 25 M. 300 at pp. 309, 303, 314 and 342; *Sabapathy Pattar* v. *Murukhan* (1903) 13 M. L. J. R. 266. Cf. *Etyati* v. *Matalakat* (1904) I. L. R. 28 M. 211; *Debi Prasad* v. *Jai Karan* (1902) I. L. R. 24 A. 479; *Jindagar* v. *Jan Ali* (1904) 1 A. L. J. R. 306. *See* also *Ranga* v. *Bhanu Bhatta* (1901) 3 Bom. L.R. 554; *Nand Ram* v. *Babaji* (1897) I.L.R. 22 B. 771; *Ishwar* v. *Gopal* (1903) I.L.R. 28 B. 102.

7. *Babu Prasad* v. *Khiali Ram* (1906) 3 A. L. J. 828.

8. *Venkata Krishna* v. *Thiagaraya* (1899) I. L. R. 23 M. 521: *Sheo Narain* v. *Chunni Lal* (1900) I. L. R. 23 A. 88.

9 (1886) I. L. R. 9 M. 354. This has now been overruled—see cases cited in Note (10).

10. *Pichuvayyangar* v. *Seshayyangar* (1894) I. L. R. 18 M. 214; *Munisami Naidu* v. *Munisami* (1898) I. L. R. 22 M. 293; *Muhammad* v. *Fatima* (1888) I. L.R. 11 A. 314; *Shitlal* v. *Jumaklal* (1893) I.L.R. 8 B. 542.

although if the first court amends wrongly and no steps have been taken to rectify the mistake, the validity of the amended decree cannot, according to the Calcutta High Court, be disputed in execution[1].—Ed.] The decision in C. M. S. A. 20 of 1890 accords with this view. S. 579, C. P. C., which speaks of confirming the judgment of the court below and not of dismissing the appeal, and S. 582, C. P. C., which confers on the appellate court the same powers and duties as the original court has, would seem to shew that the appellate court is not a mere court of error but that its decrees take the place of those of the original. Considerations of an opposite character are referred to in the dissenting judgment of *Mahmood* J.—*Muhammad Sulaiman* v. *Yar Khan.*[2] See I. L. R. 15 M. 403.

Maneklal Jagjivan *v.* **Nasia Raddha.**—I. L. R. 15 B. 405.—An oral application for sale of attached property is a step in aid of execution. *Ambica Pershad Singh v. Surdhari Lal*[3] followed. [Cf. *Keshavlal* v. *Pitamberdas*[4] and *Trimbak* v. *Kashinath*[5] where, however, the question whether an oral application could have been presumed was left open.—Ed.]

Vithu *v.* **Dhondi.**—I. L. R. 15 B. 407.—In this case the learned judges were strongly inclined to hold that the setting up by the tenant of a tenancy different in character from the true relation, was not such a denial of the landlord's title as would work a forfeiture of the tenancy. They refuse to follow *Vivian* v. *Moat*[6], and accept the view of the Calcutta High Court in *Kali Kishen* v. *Golam Ali*[7]; *Kali Krishna* v. *Golam Ally*[8]. There is much to be said in favour of restricting the scope of the penal rules regarding forfeiture. [See notes on *Chidambaram Pillai* v. *Sabapathi*[9]. Setting up title as a permanent occupancy tenant is not such a denial of title as to work a forfeiture. See *Chinna Narayudu* v. *Harischendra*[10]. But cf. *Thakore* v. *Bamanji*[11]. Merely putting the landlord to proof of his rights and denial of the extent of landlord's interest is not a denial of a title. *See Mallika* v. *Makham*[12] :—Ed.]

1. *Menat Ali* v. *Amder Ali* (9 C.W.N. 605.)
2. (1888) I.L.R. 11 A. 267.
3. (1884) I. L. R. 10 C. 1851.
4. (1894) I.L.R. 19 B. 261 at pp. 266, 267.
5. (1897) I. L. R. 22 B. 722.
6. (1881) 16 Ch. D. 730.
7. (1886) I.L.R. 13 C. 3.
8. *Ibid* 248.
9. (1891) I.M.L.J. 218: M.L.J. Rev. 24
10. (1903) I.L.R. 27 M. 23.
11. (1903) I.L.R. 27 B. 515.
12. (1905) 9 C.W.N. 928.

Ramkrishna Bhikaji v. Bhimabai.—I.L.R. 15 B. 416. —*Sargeant* C. J. and *Telang* J. hold that if *mesne* profits are awarded under S. 211, C. P. C., without having been prayed for in the plaint, no court fee is payable on the amount of such profits ascertained in execution. The learned judges are also of opinion that even though future *mesne* profits are claimed in the plaint no fee would be payable in execution when the amount is ascertained. [But see *Dwarka* v. *Debendra* [1].—ED.]

Nagu v. Salu.—I.L.R. 15 B. 424.—Mr. Justice *Candy* in the course of his judgment in this case observes at page 430: "Except in summary suits a plaintiff in this country cannot succeed in ejectment on the mere ground of possession" and "the law in India is not the same as in England." In respect of this, see 7 Bom. H. C. R. 82 (A. C. J.). But the learned judge makes no reference in his judgment to the cases reported at I. L. R. 6 B. 215 and I. L. R. 8 B. 371. [See cases discussed in 1 M. L. J. 561.—ED.]

Vishnu Bhikaji Phadke v. Achut Jagannath Ghate —I.L.R. 15 B. 438.—The construction of Art. 13 of Sch.
[* 549] II of the Limitation Act has given rise to *differences of opinion. Whether a suit brought is one to set aside the order and the relief could not be obtained without setting it aside, is a question that has not received a uniform answer. The Bombay High Court (*Birdwood* and *Parsons* JJ.) is of opinion, differing from *Gowri Prosad Kundu* v. *Ram Ratan Sircar*,[2] that the one year rule under Art. 13 did not apply to a suit by one decree-holder for refund of a rateable share of the judgment-debtor's assets realized in execution and paid over to another decree-holder entirely. It was not necessary according to the court to set aside the order passed under S. 295, C. P. C. Such an order was, moreover, not one made in a proceeding other than a suit.

Surendara Nandan Das *alias* **Ganendra Nandan Das v. Sailaja Kunt Das Mahapatra.**—I.L.R. 18 C. 385. —In an undivided Mitakshara family when the widow of one member makes an adoption, the adopted son divests the estate taken by his father's brother by survivorship. When by the husband's will a widow was directed to manage all affairs with

1. (1906) I.L.R. 33 C. 1232. 2. (1886) I.L.R. 13 C. 159.

the consent of his brother and she was to adopt a son with his good advice and opinion, the adoption she made was valid, although he had refused to give her advice and assistance The consent was not a condition precedent to the validity of the adoption. The first point laid down seems to be only the decision in *Virada Pratapa Raghunatha Deo* v. *Brojo Kishore Patta Deo*[1] [See also *Bachoo* v. *Mankorebai*[2] and cf. *Sreeramulu* v. *Kristamma*[3]. But see *Faizuddin* v. *Tincouri*[4]. Upon the second point cf. *Amrito Lall Dutt* v. *Surnomoni Dasi*[5] affirmed by the P. C.[6] The observation in this case that "courts should not be too astute to defeat an adoption but should rather do its utmost to support it" has been given effect to by the P.C. in the construction of authorities to adopt—see *Suryanarayana* v. *Venkataramana*.[7]—ED.]

Chogemul v. The Commissioners for the Improvement of the Port of Calcutta.—I. L. R. 18 C. 427.—The decision in this case has practically no importance at present since the passing of Act IX of 1890. S. 72 of the Act limits the liability of a Railway Company to that of bailees under the Contract Act. As to the extent of a Railway Company's liability under Act IV of 1879, the decision of the Calcutta High Court in *Moothora Kant Shaw* v. *The Indian General Steam Navigation Company*[8] differing from *Kuverji Tulsidas* v. *The Great Indian Peninsula Railway Company*[9] that it is that of a common carrier, has been accepted by the Privy Council in the recent case reported in *The Indian Jurist* for July 1891. [The decision here referred to is that of *The Irrawaddy Flotilla Company* v. *Bugwandas*[10] which overrules the Bombay case and thus affirms the view taken in the case under notice. The Judges in Bombay, however, would still seem to doubt whether the earlier Bombay case (*Kuverji* v. *G. I. P. Railway Company*[9]) was really overruled for their Presidency—see *G. I. P. Railway Company* v. *Raisett Chandmull*[11].—ED.]

Norendro Nath Bose v. Abinash Chunder Roy.—I. L. R. 18 C. 445.—The decision of the Allahabad High Court

1. (1876) I.L.R. 1 M. 69 L R. 3 I.A. 154.
2. (1904) I.L.R. 29 B. 51, 57.
3. (1902) I.L.R. 26 M. 143 at p. 152 *per Bhashyam Iyengar*.
4. (1895) I.L.R. 22 C. 565 (571, 572).
5. (1898) I.L.R. 25 C. 662 (689, 690).
6. (1900) I.L.R. 27 C. 996.
7. (1906) I.L.R. 29 M. 382: L.R. 33 I.A. 145.
8. (1883) I. L. R. 10 C. 166.
9. (1878) I. L. R. 3 B. 109.
10. (1891) I. L. R. 18 C. 620 (631).
11. (1894) I. L. R. 19 B. 165 (181, 194).

in *Balkaran Rai* v. *Gobind Nath Tiwari*, [1] nearly twenty years after the passing of the Court Fees Act, has been productive of great mischief. The effect of Ss. 6 and 28 of the Act is stated to be that, if an appeal is presented in time on insufficient stamp and the deficiency is made good after the expiry of the appeal time, the appeal is barred. We cannot help thinking that due effect has not been given to the second half of S. 28 of the Court Fees Act which speaks of the receipt and filing of a document through mistake or inadvertence, to S. 54, Cl. (*b*), C.P. C., which provides for the return of a plaint insufficiently stamped, as extended to the appellate court under S. 582, and to the omission in the Limitation Act of the explanation to S. 4 of the Bill, which provided that an appeal was presented only when it was pro-
[* 550] perly stamped. *The decision of the Allahabad Court, however, seems to have been followed in Calcutta in an unreported case. But the Madras High Court has dissented, on the authority of *Skinner* v. *Orde*,[2] from the view of the Allahabad High Court in two cases (Ref. case 36 of 1890 and S. A. 809 of 1890) the first decided by *Muthusami Aiyar* and *Parker* JJ. and the second by *Collins*, C.J. and *Parker* J. See, however *Skinner v. Orde*[2] distinguished in *Bishnath Prasad* v. *Jagarnath Prasad*.[3] The decision of *Wilson* J. is based on S. 71 of the Presidency Small Cause Court Act which corresponds to S. 6 of the Court Fees Act. The period of limitation for an application for rehearing is no doubt prescribed by S. 38 of the Small Cause Court Act instead of the Limitation Act and the argument therefore based on the omission of the explanation to S. 4 in the Limitation Act would have no application to the case before *Wilson* J. But there seems to be no reason why a different rule should apply to this case from the one which commends itself to us in cases governed by the Limitation Act. [The principle of this decision has not been accepted even in Allahabad as regards plaints. See *Hari Ram* v. *Akbar Husain*[4] (a Full Bench case). As regards appeals the decision ceased to be of effect after S. 582 A. The other High Courts have always taken a different view from that enunciated in the Allahabad case under notice though the Madras High Court in one case adopted this view. See *Assan* v. *Pathumma*[5]

1. (1890) I. L. R. 12 A. 129.
2. (1879) I. L. R. 2 A. 241.
3. (1891) I. L. R. 13 A. 305.
4. (1907) I.L.R. 29 A. 749.
5. (1899) I.L.R. 22 M. 404.

per *Subrahmanya Aiyer*, J.; *Valambal* v. *Vythilinga Mudaliar*[1]: but see contra *Venkatramayya* v. *Krishnayya*[2] and per *Davies* J. in *Assan* v. *Pathumma*[3]. The *dictum* of Sir *S. Subrahmanya Aiyar* has been approved by a Full Bench in *Gavaranga* v. *Botokrishna*[4]. For Bombay see *Dhondiram* v. *Taba Savadan.*[5] For Calcutta see *Janakdhary Sukul* v. *Janki Koer*[6] and the cases therein cited.—ED.]

Oudh Behari Lal *v.* **Nageshar Lal**:—I. L. R. 13 A. 278.—An application for sale in accordance with a mortgage decree under S. 88 Act IV of 1882, is the same as one for an order absolute for sale under S. 89 of the Act. It is a proceeding in execution and may be instituted in the court charged with the execution of the decree.

[There is a large body of authority in favour of the view that an application for order absolute is a proceeding in execution. See *Chunni Lal* v. *Harnam Das*[7]; *Parmeshri* v. *Mohan Lal*[8]; *Ali Ahmad* v. *Naziran Bibi*[9]. On this view the application should be made to the Court of First Instance. See *Venkata Krishna Ayyar* v. *Thiagaraya Chetti*[10]; *Sheo Narain* v. *Chunni Lal*[11]. Assuming the application to be one for execution it is a different question whether any period of limitation governs, and if so whether Art. 178 or Art. 179 applies. Upon this point there is a considerable conflict of authority. The cases in the different presidencies are discussed and their effect correctly stated by Mr. Justice *Mookerjee* in *Purna Chandra Mandal* v. *Radha Nath.*[12] Apparently it is upon the question of limitation that the case under notice is discussed and doubted by *Stanley* C. J. in *Sham Sundar* v. *Muhammad Ihtisham*[13] but it is again affirmed in *Baldeo Prasad* v. *Ibn Haidar*[14]. The Calcutta view that it is not an application for execution and is not governed by any rule of limitation is no longer tenable after the new Code of Civil Procedure:—ED.]

The Calcutta High Court requires the conditional decree to be made absolute by an order under S. 89, vide *Poresh Nath* v. *Ramjodu*[15] though a sale is not invalid if it has been made

1. (1900) I. L. R. 24 M. 331 : (1902) I.L.R. 25 M. 380.
2. (1897) I. L. R. 20 M. 319.
3. (1899) I. L. R. 22 M. 494.
4. (1909) I. L. R. 32 M. 305.
5. (1902) I. L. R. 27 B. 33.
6. (1900) I. L. R. 28 C. 427.
7. (1898) I. L. R. 20 A. 302.
8. (1898) I. L. R. 20 A. 357.
9. (1902) I. L. R. 24 A. 542 (544).
10. (1899) I. L. R. 23 M. 521.
11. (1900) I. L. R. 23 A. 88.
12. (1906) I. L. R. 33 C. 867 (875, 876).
13. (1905) I. L. R. 27 A. 501.
14. (1905) I. L. R. 27 A. 625.
15. (1889) I. L. R. 16 C. 246.

without that order, see *Siva Pershad* v. *Nundo Lall*[1]. The provisions of the Code of Civil Procedure would of course apply to the mode of conducting the sale, &c., though as an attachment is unnecessary (*Dayachand* v. *Hemchand*[2]) claims cannot be investigated under Ss. 278 *et seq.* C. P. C.

Amme Raham *v.* **Zia Ahmad**:—I. L.R. 13 A. 282.—The court rightly holds that Art. 127 cannot apply to a suit for a share of the property of a deceased ancestor, brought by a Muhammadan, because it is not a suit to share in the property of a joint family. This decision has been followed in Madras in A. S. 13 of 1890 and S. A. 794 of 1890 by *Parker* and *Wilkinson* JJ.; their Lordships applied Art. 123 to such a suit. It is somewhat startling to be told that Muhammadans, entitled to shares in the property of a deceased as his heirs, should not enjoy the property together for more than 12 years after him, without the risk of the sharer turned out of possession, being barred by limitation. It would obviously seem to be a case to which Art. 144 not Art. 123 would apply. It may, however, be that if they were not in enjoyment of the properties, Art. 123 would apply.

Two of the judges go the length of holding that the phrase "to share therein" in Art. 127 means, to have restoration to joint enjoyment. This construction would exclude suits for partition by a Hindu from the article. It is difficult to believe that this could have been the intention of the legislature, for the corresponding Art. 127 of Act IX of 1871 speaks of the demand and refusal of "his share" as the starting
[* 551] point. The *only change contemplated was the making the knowledge of exclusion the starting point. Suits for partition which fell within Art. 127 of Act IX of 1871 could not have been intended to be excluded from the corresponding Art. 127 of the later Act by the change in the language which relates to a totally different matter.

[The Calcutta and Madras High Courts have accepted the view taken in the above case that the expression "joint family property" must be taken in a technical sense, *i.e.*, in the sense in which this expression is understood in the Hindu system of law and that it does not, therefore, apply to a Mahomedan

1. (1890) I.L.R. 18 C. 139.
2. (1880) I.L.R. 4 B. 515 (520).

claiming a share of an intestate's property. See *Mahomed Akram Shaha* v. *Anarbi Chowdhrani* [1]; *Poyran Bibi* v. *Lakhu Khan Behari* [2]; *Patcha* v. *Mohidin*[3]; *Kasmi* v. *Ayishamma* [4]; *The Commercial Bank of India* v. *Allavoodeen Saheb*[5]. But see *Muttakke* v. *Thimmappa* [6]. The Allahabad High Court extend ,the principle of the case under notice, though with regret, to S. 4 of the Partition Act, 1893. See *Hashmat Alia* v. *Muhammed Umar* [7]. Compare also *Kartick Chunder* v. *Saroda Sundari* [8].—ED.]

SUMMARY OF ENGLISH CASES.

Bank of England *v.* Vagliano Brothers. [1891] A. C. 107.

Negotiable Instrument—Bill of Exchange—Drawer's signature forgery—Acceptance procured by fraud—Payment by Bank—Right of Bank to debit acceptor—Bills of Exchange Act, 1882—*Construction of Statute.*

Where a person manufactured a bill of exchange by forging the signature of the named drawer, procured the acceptor's signature by fraud, and forging the signature of the named payee, and obtained payment of the bill from the bank at which it was payable by the acceptor, it was held by a majority of the House of Lords that the bank was entitled to debit the acceptor with the payment, although not made to a *bona fide* holder for value.

Held by *Lord Halsbury* L. C. that the document in question was not a bill of exchange within the meaning of the Bills of Exchange Act of 1882; that the relation between the customer and the bank was that of principal and agent; that the customer having misled the bank by representations and by conduct to make the payment, he was rightly debited with the payment, and that if the document could be treated as falling within the Bills of Exchange Act of 1882, it could be treated as one payable to bearer because the payee was a fictitious or non-existing person.

Held by *Lord Herschell* :

(1) that the proper mode of construing a statute is to examine its language in the first instance and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably

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1. (1895) I. L. R. 22 C 954.
2. (1901) 7 C. W. N. 155.
3. (1891) I. L. R. 15 M 57.
4. (1891) I. L. R. 15 M. 60.
5. (1900) I. L. R. 23 M. 583 (588, 589).
6. (1891) I. L. R. 15 M 186 (191, 192)
7. (1907) I. L. R 29 A. 309
8. (1891) I. L. R. 18 C. 642.

intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

(2) That the construction, that the payee need not be fictitious or non-existent *to the knowledge of the acceptor* to render the bill payable to bearer, was the plain grammatical construction of the section and it involved no injustice because it was immaterial to the acceptor to whom he was directed to make payment, and he would be absolved by payment to the person designated or one deriving title through him if he were a real person, and by payment to the bearer if the payee were not a real person.

(3) That the words *fictitious or non-existent* did not apply merely to cases, where the payee named never had a real existence or was only a creature of the imagination, but that they applied to cases where the name of the payee was inserted by way of pretence merely without any intention that the payment should only be made in conformity therewith, and that a banker is dis-
[* 552] charged* by payment to the bearer, as well when the bill is by the terms of the statute treated as payable to bearer, as when it is in terms payable to bearer.

(4) That the fact of the drawer's name being forged made no difference in the liability of the acceptor.

(5) That the decision in *Roberts* v. *Tucker*[1], was with reference to a genuine bill where the banker had paid the wrong man leaving the acceptor liable to the true holder and was distinguishable from this case.

Held by *Lord Bramwell* [dissenting]—(1) that a banker cannot charge his customer with the amount of a bill paid to a person who had no right of action against the customer, the acceptor; (2) that the position of a banker was different from that of a clerk or agent; (3) that a payee cannot be real or fictitious according to the intention of the drawer; and (4) that it is material to the drawer to know whether the payee is a known person or not, as in the former case the payee's holding and indorsement are a guarantee that the bill is in right hands.

Dowse v. Gorton. [1891] A. C. 190.

Will—Authority to executors to carry on trade—Right of Indemnity.

(1) Where a business has been carried on by executors under an authority conferred by the will, they would be entitled to a

1. (1851) 16 Q. B. 560 : S.C. 83 R. R. 601.

general indemnity out of the estate as against all persons claiming under the will. (2) But they cannot, merely by reason of such authority, maintain this right against the creditors of the testator. (3) The executors would be entitled to carry on the business for a reasonable time to enable them to sell it as a going concern and in respect of liabilities thus incurred they would be entitled to indemnity even against the creditors. (4) No distinction can for this purpose be drawn between the assets which come into the hands of the executors at the death of the testator and property which, in their capacity of executors, they afterwards acquire.

Lane v. Esdaile. [1891]. A. C. 210.

Appellate Juisdiction Act, 1876—*Order LVIII, rule* 15—*Appeal out of time—Special leave—Refusal, no appeal against.*

The Appellate Jurisdiction Act of 1876 provides that an appeal shall lie to the House of Lords from any order or judgment of the Court of Appeal, and Order LVIII, rule 15, provides that after the lapse of the time prescribed, no appeal shall be entertaind in the Court of Appeal except by special leave of the Court of Appeal. *Held* that no appeal lay to the House of Lords against an order of the Court of Appeal refusing to give special leave to appeal. [*Kay* v. *Briggs*[1] followed.]

Montgomery v. Thompson. [1891] A. C. 217.

Injunction—No trade mark—Name calculated to deceive.

A manufacturer can sue for a perpetual injunction to prevent a rival manufacturer from selling his commodity under such a designation as to deceive the public into the belief that he is selling the plaintiff's commodity and he ought not the less to be restrained from doing so, because the practical effect of such restraint will be much the same as if the plaintiff had a right of property in a particular name.

Philipps v. Halliday. [1891] A. C. 228.

Long possession—Presumption—Legal origin.

(1) Where there has been long continued possession in assertion of a right, the right should be presumed *to have had a legal origin if such a legal origin was possible, and this presumption applies even if the alleged right in its inception rested on a foundation invalid in point of law, and the [* 553]

1. (1889) 22 Q.B.D. 343.

Court will presume the performance of all acts and the existence of all circumstances necessary to create a subsequent valid title, unless the subsequent enjoyment is shown be to more consistent with the illegal origin than with the legal origin.

Gibbs *v.* Messer. [1891] A.C. 248.

Victorian Land Transfer Act—Forged mortgage—Registry—Bona-fide purchaser for value—No title.

Under the Victorian Transfer of Land Statute, those who derive a registered title *bona fide* and for value from a registered owner are protected. Where by means of a forged transfer, a fictitious name has been entered in the register as that of the transferee and the forger again forges a mortgage in the name of the fictitious transferee, the mortgagee does not by registration of the forged mortgage acquire a valid title, although the registration will enable the mortgagee to pass a good title to a *bona fide* purchaser for value.

Musgrove *v.* Chun Teeong Toy. [1891] A.C. 272.

Victorian Chinese Act, 1881—Master to pay £10 for one immigrant—Offence to bring more than a certain number—Alien's right to enter British territory—Maintainability of action.

By the Victorain Chinese Act of 1881, before a Chinese immigrant shall be permitted to land at any port in Victoria, the master of the vessel conveying the immigrant should pay to the customs officer the sum of £10 for every such immigrant and vessels which brought more than one immigrant for each 100 tons of the tonnage were punished. *Held*: that where the master of a vessel has committed an offence by bringing a greater number of Chinese into the port than the statute allows, he can have no right to require the collector of customs to receive payment in respect of such immigrants. Nor has any immigrant an individual right under these circumstances to compel the customs officer to receive payment. An alien has no legal right enforceable by action to enter British territory.

In re **Apollinaris Company's Trade Marks.**
[1891] 2 Ch. 186.

Trades-Marks Registration Act, S. 5—Person aggrieved—"Trade-Mark," what is—Registration.

A man in the same trade as one who has wrongfully registered a trade-mark, and desiring to deal in the article is "an aggriev-

ed person" (unless it be shewn that on account of some circumstances entirely independent of the trade-mark, the person complaining could never carry on any trade in the article) within the meaning of S. 5 of the Trades-Marks Registration Act, and is therefore entitled to apply for the removal of the trade-mark, if the person who wrongfully registers the trade-mark thereby either excludes, or is likely in the future to exclude, the rival trader from a portion of the trade into which he desires to enter, or hampers him in his trade, or has used against him the fact of his having the trade-mark on the register, in any legal proceeding between him and the rival trader, in which the latter was entitled to rely on the circumstance that the trade-mark ought not to have been on the register, though he might have other valid contentions to rely on. When a company in England has obtained a right to the whole produce of a foreign company owning a spring, and registered a trade-mark indicating the origin of the mineral waters: *Quære*, whether a rival company in England dealing in natural and artificial waters is 'a person aggrieved' by the registration within the meaning of the above section.

The object of S. 5 is merely to prevent the intervention of common informers, or persons interfering from merely sentimental motives, and not to make evidence of serious damage essential. [554]

A trade-mark must be such as to distinguish the goods of the person registering, from those belonging to all others; an importer of foreign goods cannot adopt as his own merely the producer's trade-mark, without some distinctive addition, even though the producer may consent, and the importer may have obtained the sole right of selling the goods in his own country, unless, perhaps, the importer has purchased all the produce of the producer (as to which *quære*). Where a trade-mark tendered for registration is likely to mislead the public, as by inducing the public to believe that a distinctive portion of it alone is really the only thing registered, registration ought to be refused. Where a trade-mark was wrongly registered on the date of registration, the fact that the defendant might at the time of the application for its removal, be entitled to its registration if he applied, would be no ground for allowing it to remain on the register, because to do so would be to preclude the public from challenging the new title.

The names of well-known mineral-water springs, such as Hunyadi Janos, Apollinaris, &c., are geographical, and so words

of description, and not mere fancy words not in common use, or invented words.

In re **Slevin: Slevin *v.* Hepburn.** [1891] 2 Ch. 236.

Bequest to charitable institution—Institution ceasing after testator's death but before payment of legacy—Cypres.

A testator made a bequest to a charitable institution (voluntarily maintained by a private individual at her own expense). The institution was in existence at the date of the testator's death, but was discontinued shortly afterwards before the legacy was paid over. *Held*, that the legacy became the property of the charity on the death of the testator, and that on its ceasing to exist, became applicable by the Crown for some analogous purpose of charity. The decision of *Stirling* L. J., reported at 1891, 1 Ch. 373, reversed. See 1 M.L.J. REV. EDN. 263

Aas *v.* Benham. [1891] 2 Ch. 244.

Partnership—Information obtained as partners—User within scope of partnership—Benefits derived — Partner's liability to account.

A partner who avails himself of information obtained in the course of the transaction of partnership business, or by reason of his connection with the firm, for any purpose which is within the scope of the partnership business or of any competing business, must account to the firm for any benefits derived by him by using such information, but he is not bound to account, if the information is used for purposes wholly outside the scope of the firm's business.

Per *Bowen* L.J. :—(1) The fact that a partner used firm paper or wrote letters in the firm-book, in which he represented that a new business started by him was so started on account of the firm, did not amount to an agreement between the partner and the firm business. (2) Although such a representation by the partner might entitle the firm to claim against third parties the benefits of acts professedly done by the partner in their behalf, it was not enough, as between the partner and the firm, to entitle the latter to claim the benefits of the new business started
[* 555] *by the agent, and an agreement to enlarge the scope of the partnership business is necessary to give them such a right. [*Dean* v. *MacDowell* [1] explained and followed.]

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1. (1887) 8 Ch. D. 345.

Crawford v. Forshaw. [1891] 2 Ch. 261.

Will—Legacy to charitable institutions named or such other as executors may select—Legacy to executors on failure of a prior legacy—Power to select given to executors in their official capacity.

A testator gave certain legacies to certain charitable institutions or such others as his "executors herein named may select." In an earlier part of the will, he provided that on failure of a legacy given to Katie Hughes, the amount was to be distributed to his "executors," without the expression "herein named," amongst such charities as they might approve of. One of the three executors appointed by the will renounced probate, but claimed the right to determine, with the others, the charitable institutions to which the residuary estate was to go. *Held* by the Court of Appeal that the power was given to the executors in their official capacity, and that, in consequence, the executor who renounced had no right to exercise the power, and the remaining two were entitled to do so.

Bonnard *v.* Perryman. [1891] 2 Ch. 269.

Libel — Publication, injunction restraining—Interlocutory, when not to be granted—Truth and justification.

The Court has power to restrain the publication of a libel by injunction, as well as to grant such an injunction on an interlocutory application. An interlocutory injunction ought not to be granted except in the clearest cases, as where a verdict that the matter complained of is not libellous would be set aside as unreasonable. Where the defendant pleads truth and justification, and the Court cannot say that the plea must be wholly unfounded, it ought not be granted.

Salomons *v.* Knight. [1891] 2 Ch. 294.

Libel—No weight to imputations—No serious and pressing injury—Interlocutory injunction.

Although the libel complained of may be very serious in its nature, and apparently without justification, the Court will not grant an interlocutory injunction where there is no reason to suppose that any people would attach weight to the imputations or that any serious and pressing injury to person or property is likely to be caused by the libel.

In re **Violet Nevin (an infant).** [1891] 2 Ch. 29.

Infant—None entitled to guardianship or custody—Religion of child—Father's wishes—Antenuptial settlement by father that child should be brought up in wife's religion (Roman Catholic), Validity of—Child's welfare, sole test.

Where there is none entitled to the guardianship or custody of an infant, the paramount consideration with the Court in determining the religion in which it is to be brought up must be the child's welfare, but it will pay great respect to the expressed wishes of the father. An antenuptial agreement whereby the father agreed that the children of the marriage should be brought up in the Roman Catholic religion, which his wife professed, is not binding on him, and therefore, on the Court, after his death. The fact that the child was in accordance with the agreement baptized as a Catholic is not conclusive with regard to the father's wishes in the matter, and if on a consideration of all the circumstances, the Court comes to the conclusion that the child's welfare requires that she should be brought up as a Protestant, the Court will order her to be so brought up.

Roberts *v.* Cooper. [1891] 2 Ch. 335.

*Married woman—Reversionary interests possessed by wife—Joint assignment by husband and wife—Wife's assent—*20 *and* 21 *Vic., C.* 57*—Equity to settlement against assignee.*

A married woman possessed reversionary interests in two sums of £ 500 under the wills of her father and of her grandfather respectively. They were assigned jointly by the *husband [* 556] and wife in 1864. The wife was examined with regard to the assignment under 20 & 21 Vict., Ch. 57, and assented to it.

The assignment was in law inoperative so far as the wife was concerned. The reversions having fallen due, the husband and wife received the sum of £ 500 due under the grandfather's will, no notice having been given of the assignment to the trustee of the will. The wife now applied for the settlement with regard to the £ 500 due under her father's will. The assignee gave up the right to half the sum, but contested the equity to a settlement with regard to the remainder.

Held that taking into consideration her conduct in assenting to the assignments, and in assisting her husband to draw the sum of £ 500 under the grandfather's will, she was not entitled to the settlement of more than half the amount claimed.

Per *Bowen,* L. J. :—The wife has no equity to a settlement against the assignee of the fund. *Quaere.*—Whether, if the assignee had not given up his claim to half the funds, he would not have been entitled to the whole ?

Harrison. *v.* Southwark and Vauxhall Water Company. [1891] 2 Ch. 409.

Statute, construction—Statutory authority to do particular act —Implied authority to do all absolutely and reasonably necessary —Sinking of shafts—Disturbance to neighbour—Nuisance.

A statutory authority to do a work includes authority to do not only all things absolutely necessary, but also all things reasonably necessary for the execution thereof. Where, therefore, the statute authorizes the sinking of shafts on a land, and the execution of it caused disturbance to the neighbour by noise, it was held that if the defendant used reasonable care and skill in doing the work, the fact that by using better instruments, at a greater expense, less noise might have been caused, will not make the defendant's act a nuisance.

Where the act authorized by statute is one which a private owner may do on his land, the liabilities and responsibilities of the person authorized by the statute are the same as those of a private owner doing the act on his own land.

An act which may amount to a nuisance if done wantonly or permanently may not be so, if done for a lawful purpose and is of a temporary nature. (*Williams* J.)

Medawar v. Grand Hotel Co. [1891] 2 Q. B. 11.

Inn-keeper—Plaintiff's bag containing trinkets—No space in hotel—Bag left in vacant room and subsequently taken to corridor—Trinkets stolen—Contributory negligence—26 & 27 Vic., C. 41, *S.* 1*—Onus—Inn-keeper's liability.*

The defendant was an inn-keeper. The plaintiff arrived at the inn one morning and being told that the hotel was full, that there was only one bed-room vacant, which had been engaged by a lady and a gentleman, who were expected that evening, and that the plaintiff might use it for the purpose of washing and dressing, he had his luggage taken into that room. After washing and dressing he went into the coffee room, had his breakfast, paid for it and left it. A bag of his containing some trinkets, he had kept open in the vacant room. Before he

returned, which was at midnight, the lady and gentleman arrived, were shown into the room, and the plaintiff's bag taken out and thrown into the corridor by some of defendant's men. The plaintiff's luggage, on his return, was taken into another [* 557] room, which had fallen vacant. The plaintiff discovered next* morning that his trinkets had been stolen. There was no evidence to shew whether the trinkets were stolen while the bag was in the bedroom or in the corridor.

Held by Lord *Esher*, M.R., and *Bowen* L. J., that the plaintiff was received as a guest into the hotel, that the relation of innkeeper and guest continued until a reasonable time after the plaintiff's goods had been placed in the corridor, and that if the trinkets were stolen in the room, there was contributory negligence on the part of the plaintiff, but that if they were stolen in the corridor, the loss was due to the negligence of the defendant's men in placing the plaintiff's bag there.

But *held* under S. I of 26 & 27 Vic., Ch. 41, that the defendants were liable up to £30 because they could not discharge the onus which lay on them of shewing that the plaintiff's negligence had contributed to the loss; also that beyond the amount of £60 the defendants were not liable, because the plaintiff could not discharge the onus, which lay upon him, of showing that the loss had occurred "through the wilful act, default or neglect" of the defendants.

Held, by *Fry*, L. J., that the plaintiff was not a guest in the hotel at the time when the loss occurred and that therefore the defendants were not liable at all.

Joyner *v.* **Weeks.** [1891] 2 Q. B. 31.

Landlord and Tenant—Covenant to leave premises in repair—Breach of—Measure of damages—Amount reasonable and proper for putting in state of repair.

Held by the Court of Appeal that when there is a lease with a covenant to leave the premises in repair at the end of the term, and the covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises in the state of repair in which they ought to have been left. The existence of a contract with a third person, by reason of which the lessor would be in no worse position than if the defendant's covenant had been performed, does not affect the measure of damages which the plaintiff is entitled to claim

Burt v. Gray. [1891] 2 Q. B. 98.

Conveyancing and Law of Property Act, 1881, *S.* 14—*Lease —Covenant to repair, breach of—Under-lessee's right to enforce.*

An under-lessee of a part of the premises demised to his lessor cannot obtain relief for breach of a covenant to repair contained in the head lease, notwithstanding the provisions of S. 14 of the Conveyancing and Law of Property Act, 1881, enabling the Court to grant relief to lessees against forfeiture for breach of covenant.

Barlow v. Terrett. [1891] 2 Q. B. 107.

Nuisances Removal Act, 1863, *S.* 2—*Unsound meat—County farmer sending to salesman for sale—Meat—shown by salesman to Inspector—Meat destroyed by order of Justice—No exposure for sale.*

Unsound meat was sent by the appellant, a county farmer, to a salesman in London for the purpose of being sold and used as human food. The salesman, without exposing it for sale, called the attention of an Inspector, who had it destroyed under an order of a Justice. *Held* that the conviction of the appellant, as the owner of the meat, under S. 2 of the Nuisances Removal Act, 1863, was wrong as the meat was not "exposed for sale or deposited in any place for the purpose of sale."

Unwin v. Hanson. [1891] 2 Q.B. 115.

5 & 6 Wm. 4., C. 50, S. 65—'*Lop,*' *meaning of— Cutting off branches laterally—No authority to cut off tops of trees.*

Held that the term "lop" as used in S. 65 of 5 & 6 Wm. 4, Ch. 50, meant "to cut off' the branches *laterally, and therefore that the section did not give any power or authority to the Justices or the Surveyor in respect of cutting off the tops of any trees. [* 558]

Per Lord *Esher*, M. R.—If an Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language; if the Act be one passed with reference to a particular trade, business or transaction, known and understood to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words.

In re **Bellencontre.** [1891] 2 Q.B. 122.

Extradition—Foreign subject—Proof of act committed in foreign country—Act must be criminal under Foreign as well as English Law.

In order to justify the extradition of the subject of a Foreign State, there must be evidence of an act committed by him in the foreign country amounting to an offence against the law of such country and which, if committed in England, would amount to an offence against English law. Where there were several charges, the fact that the evidence did not disclose a crime against English law was no answer to the claim for extradition by the French Government.

The Queen *v.* Griffiths. [1891] 2 Q. B. 145.

Bankruptcy petition—Commission of acts within four months—Construction of statutes—No penal offence, created retrospectively.

Where the commission of certain acts by a person, if within four months next before the presentation of a bankruptcy petition by or against him, amounted to an offence under a statute and the acts now in question were committed before the statute, came into force though the petition was presented afterwards: *Held* that they did not amount to an offence within the statute for all the ingredients of the offence had not taken place before the statute came into force, and that it was immaterial that the statute created the offence by directing the words of an earlier penal statute in force at the time of the commission of the acts, to be read differently so as to embrace them.

Per *Denman* J.—Unless the intention is clearly expressed by the Legislature, criminal offences are not to be created by giving retrospective operation to Acts of Parliament.

The Queen *v.* Marsden. [1891] 2 Q. B. 149.

Criminal Law Amendment Act, 188-, *S.* 4—*Unlawfully and carnally knowing girl under* 13 *years—Proof of emission not necessary.*

It is not necessary to prove emission to constitute the offence of unlawfully and carnally knowing a girl under the age of thirteen years, under S. 4 of the Criminal Law Amendment Act, 1885.

In re **Parrott**: *Ex parte* **Cullen**. [1891] 2 Q. B. 151.

Attestation of Instrument—Party to transaction cannot be attestor—Bill of Sale Act.

A party to a transaction cannot be an attesting witness to the instrument by which the transaction is effected. The Court of Appeal held in *Seal* v. *Claridge*[1] that the grantee of a Bill of Sale could not be an attesting witness thereof. (See 1 M. L. J Rev. *ante* 304)

Hunt *v.* **Great Northern Railway Co.** [1891] 2. Q. B. 189.

Master and Servant—Railway Company dismissing guard for gross neglect of duty—Fact of dismissal and ground published in monthly circular addressed to servants—Privileged occasion.

The defendants dismissed the plaintiff, a guard in their service, on the ground that he had been guilty of gross neglect of duty and published his name in a printed monthly circular addressed to their servants stating in it that he had been dismissed and the ground of his dismissal. In an action for libel: *Held* by the Court of Appeal affirming the decision of *Stephen* J. that the defendants* were not liable as the occasion was privileged. [* 559] Per Lord *Esher*, M. R.—A privileged occasion arose if the communication was of such a nature that it could fairly be said that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them.

Roberts *v.* **Jones**; **Willy** *v.* **Great Northern Railway Co.** [1891] 2 Q. B. 194.

Costs—Exercise of discretion—Circumstances when costs do not follow event.

In these cases, *Hawkins* J. discusses the authorities laying down rules for the exercise of the Court's discretion as to costs where they do not follow the event. In *Cooper* v. *Whittingham*[2] Sir *George Jessel*, M. R., says: "Where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, no omission or neglect which would induce the Court to deprive him of his costs, the Court has no discretion and cannot take away the plantiff's right to costs. There may be misconduct of many sorts; for instance there may be misconduct in commencing the proceedings, or some miscarrige in

1. (1881) 7 Q. B. D. 516. 2. (1880) 15 Ch. D. 504

the procedure, or any oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs, but where there is nothing of the kind costs follow the result."

O' Shea v. Wood. [1891] P. 286.

Inspection of documents—Action on will—Papers in the possession of testator's attorney—Privilege—Sufficiency of affidavit—Words "communications between client and solicitor" not enough.

The defendant having applied for inspection of documents in an action by the plaintiff on a will, the Court refused to order the plantiff to produce papers in the possession of the attorney of the testatrix, which belonged to him, though they related to her affairs and came into existence while he was acting as her professional adviser. The Court also refused to call upon the solicitor to produce the documents for the purpose of discovery or to direct his examination at that stage of the proceedings. Where a party made an affidavit objecting to produce documents on the ground that they were privileged "as communications between herself and her solicitor", *held* by the Court of Appeal, reversing the decision of *Jeune* J., that it was insufficient to protect them for " it is not sufficient for the affidavits to say that the letters are a correspondence between a client and a solicitor, but the letters must be professional communications of a confidential character for the purpose of getting legal advice."

In the Goods of **Mary E. Mann** [1891] P. 293.

Will—Property in England—Will limited to property abroad—Probate—Intestacy as regards foreign property—Administration to sole next of kin.

Where the deceased died intestate with reference to property in England, but left a will limited to property abroad of which the executors obtained probate in the foreign Court : *Held* that administration of the property in England could be granted to the sole next of kin.

JOTTINGS AND CUTTINGS:

[* 525] **Disposal of Miscellaneous Cases in the High Court.*—During the last two years or more, appeals against original and appellate orders, and revision petitions under S. 622 of the Civil

Procedure Code and S. 25 of the Provincial Small Cause Courts Act, have been posted for decision in the first instance before a single Judge of the High Court, and disposed of by him, except where he considers it advisable that any of them should be heard by a Bench of two Judges. This practice has much to commend it. But owing to the fact that sittings for the hearing of such cases are not arranged as frequently as is necessary, there is great delay in their disposal. They are many instances in which they do not appear on the cause list at all for a period of 18 months, and sometimes they are not heard for two years after they are filed. They are generally cases of small pecuniary value, and those in which poor people are chiefly concerned. It is to be regretted that they are kept pending for a longer period than most second appeals and many regular appeals. We hope the Chief Justice will be able to make arrangements for their speedier disposal. It is to his Lordship that we mainly owe the recent marked improvements in the promptness and efficiency with which criminal cases are disposed of, and we hope that he will take early steps to remedy the grievance that exists with regard to Miscellaneous Cases.

The Original Side rules.—Under the new rules framed for the Original Side of the High Court, the defendant has to file a written statement within 8 days from the service of the summons, if he wishes to defend the suit. We think this is too short a period. He can no doubt get the time extended on payment of a fee of Rs. 5 for sufficient cause. But in the majority of cases the defendant would have to get copies of some documents from public offices, or to obtain original documents themselves, or accounts might have to be looked into before the statement could be drawn up by his Vakil or Attorney. We think a period of fifteen days should be given him as a rule for filing the statement. The present rule unnecessarily adds to the already heavy tax on justice.

Liberty of Speech in Council.—The statement which has been going the rounds of the press that several Englsh clubs propose to expel Sir Edward Clarke for his remarks upon the Prince of Wales during the trial of Sir William Gordon Cumming's case and that Her Majesty and her Council are to consider* the matter, recalls Wendell Phillip's remarks upon the duty [* 526]
of a fearless lawyer and his contrast between such and one who courted favour or success at the expense of a fearless discharge of duty: "Suppose we stood in that lofty temple of jurisprudence

—on either side of us the statues of the great lawyers of every age and claim—and let us see what part New England—Puritan, educated, free New England—would bear in the pageant. Rome points to a colossal figure and says, "That is Papian, who, when the Emperor Caracalla murdered his own brother, and ordered the lawyer to defend the deed, went cheerfully to death, rather than sully his lips with the atrocious plea; and that is Ulpian, who, aiding his prince to put the army below the law, was massacred at the foot of a weak but virtuous throne." And France stretches forth her grateful hands, crying, "That is D' Agnessean, worthy, when he went to face an enraged king, of the farewell his wife addressed him—'Go! forget that you have a wife and children to ruin and remember only that you have France to save." England says: "That is Coke, who flung the laurels of eighty years in the face of the first Stuart, in defence of the people. This is Selden on every book of whose library you saw written the motto of which he lived worthy, 'Before everything—Liberty.' That is Mansfield silver-tongued who proclaimed—'Slaves cannot breathe in England, if their lungs receive our air, that moment they are free.' This is Romilly, who spent life trying to make law synonymous with justice, and succeeded in making life and property safer in every city of the empire. And that is Erskine, whose eloquence, spite of Lord Eldon and George III, "made it safe to speak and to print." Then New England shouts: "This is Chote, who made it safe to murder and of whose health thieves asked before they began to steal." Always think twice when saints and sinners, honest men and editors, agree in a eulogy. English Clubs and British Royalty will do well to ponder upon these remarks, before acting."—*The Albany Law Journal.*

Attempt to Corrupt a Judge.—At the thirty-first anniversary festival of the Solicitors' Benevolent Association, which took place on the 26th June (with Mr. R. Cunliffe in the chair), the Chairman proposed the toast of "The Bench and the Bar." Mr. Justice Wills, in returning thanks, expressed his obligation to the kind appreciation by solicitors of certain industries, with which he might fairly credit himself, to which it was greatly due that he occupied the position of one of Her Majesty's Judges. The Chairman had stated, and they had indorsed the state-

ment, that the body to which he belonged was incorruptible, but he might be allowed to say that was not perhaps because the opportunities for corruption did not exist, for he himself was a Judge to whom a bribe had been offered. He was once at Manchester when he received a letter from a "Scotch hawker," which was addressed to "The Judge of the Court at Strangeways," and this was delivered to him at the Judge's lodging. It contained in eight pages of note paper, a very admirable statement of a quarrel between him and his sister, which was shortly coming on for trial and explained how deeply he was wronged, and stated how very much he expected from the Judge who was going to try the cause. * It wound up: "Now, Sir, when you have found judgment for the defendant, (himself) with costs, if there is any small article you would like to receive, and feel that you could comfortably accept it, it shall be sent, and if not there is no harm done." A paragraph in the letter made it clear that the case was not going to be tried before him (Mr. Justice Wills) at all, but before the Judge of the Salford Hundred Court, and thinking that even this gentleman ought not to be left to suppose that his proposition was quite the right thing, he addressed a sharp letter to him, in which he stated that he was not the Judge who would try his case; and therefore it was of comparatively little consequence, but that a very serious offence had been committed, and that if he had not attributed it to ignorance he should have taken some grave steps. And he would like to remark how effectual the rebuke of a Judge sometimes was. In reply he received a letter containing an apology which was absolutely grovelling in its humility, but which, after having completely satisfied any sense of offended dignity proceeded: "And now, Sir, will you be good enough to tell me who is the Judge." Here was a proof that opportunities were not wanting. * [527]

Mrs. Maybrick and her Husband's Life Policy.—In the remarkable *Maybrick* Insurance Case, the High Court has held, on a special case stated for the opinion of the Court, that an action on a life policy effected on his life by the late Mr. Maybrick for the benefit of his widow (who was convicted of having murdered him) and of their children after her death, could not be sued on by the trustees of his will. The ground of the decision was that

it is not in accordance with public policy that the convict Maybrick should recover money payable on an event which had been brought about by her own felonious act, and this is in accordance with the rule in the case of the forger *Fauntleroy* [*The Amicable Society* v. *Bolland*[1]] : and in that of the murderer Palmer (*The Prince of Wales Insurance Company* v. *Palmer*[2]). It appears to have been assumed that the conviction in *Regina* v. *Maybrick*, although followed by a commutation of the capital sentence to penal servitude for life, was conclusive evidence of the felonious act of the convict. Is this quite in accordance with authority? We are inclined to doubt it, the parties in *Regina* v. *Maybrick* and in the *Maybrick* insurance case not being the same. If, for instance, a prisoner convicted of bigamy sue for administration of the second spouse's effects, the validity of the second marriage can be set up, notwithstanding the conviction. [*Wilkinson* v. *Gordon*[3] and see *The Duchess of Kingston's Case*[4].] It was held, however, in *Palmer's case* that the Coroner's inquisition charging Palmer with murder was *primâ facie* evidence of the murder: and since Mrs. Maybrick was not called to disprove the murder of her husband, as on a *habeas corpus ad testificandum*, (see 43 George III, Ch. 140, and 44 George III, Ch. 102) she could have been, there seems little doubt that the recent judgment is substantially correct. Perhaps, however, on the death of Mrs. Maybrick the action could be brought again for the benefit of those entitled to a reversionary interest in the policy.—*Law Journal.*

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[561] *PRESUMPTION OF TITLE FROM POSSESSION.

In the August number of this Journal an esteemed contributor discussed the question of the presumption of title which arises from possession. He has referred to the authorities bearing on the subject and has come to the conclusion that where neither the plaintiff nor the defendant can give any proof of title, but the plaintiff shows that he was in possession before the defendant, he is entitled to recover possession of the property sued for, on the ground that the presumption of title arising from an earlier possession prevails against that arising from a later possession. The argument seems to be that once you draw the

1. (1830) 4 Bl. (N. S.) 194. 33, R.R. 22.
2. (1858) 25 Beav. 605: 53 E.R. 768.
3. (1825) 2 Add. 152.
4. 2 Sm. L. C. 713.

presumption of title based on the plaintiff's prior possession, you have found that which you are in search of, that is, the title to the property in dispute, and unless a better title is shown to be in somebody else, the presumption of the plaintiff's title stands unrebutted. After carefully considering the matter and examining the authorities cited by the learned writer of the article in question, we find ourselves unable to agree in the conclusion arrived at by him. The question is one of great importance and deserves to be examined from all points of view. It appears to us that if a plaintiff is to succeed on the strength of his prior possession, it must be because he explains the subsequent possession of the defendant, and unless he is able to explain such subsequent possession, his suit must fail. He may be able to explain it by showing that he was forcibly dispossessed by the defendant, or that the defendant got into possession with the permission of the plaintiff or somebody through whom he claims. We are not aware of any case in which it has been held that, without any such explanation of the defendant's possession, a plaintiff has been permitted to succeed on the mere strength of his prior possession. This is explainable on general* principles. We [562] understand the principle that possession is evidence of title, unless explained, to mean that such possession is evidence of title at the time the possession is with the person setting up the title, that is, the presumption exists only so long as the possession exists. While the Court would presume that the plaintiff had title at the time he was in possession, it would no less presume that the defendant has title at the time he is in possession, for it would not unnecessarily impute any wrong to any person. Why should the Court assume that the defendant was guilty of some wrongful act in acquiring the possession, which is shown to be with him at the time the suit is brought? He may have acquired his possession in any of the various ways in which it can be lawfully acquired. The plaintiff may have abandoned his possession and title to the property, as it often occurs in the case of new settlers in countries, where there are large tracts of uncultivated and unowned land. A man goes to a new country, clears a plot of land and brings it under cultivation, but finds that for some reason or other it does not suit him to continue to cultivate it. He abandons it and takes up another plot.

Supposing another settler takes possession of the land so abandoned, and spends capital and energy in bringing it into a fit state for cultivation, surely it would be inequitable to say that the first settler can turn him out simply because he shows that he had prior possession. If it be said that he must have known that he ran the risk of being turned out by any person who showed that he had been in prior possession, we can only say that nobody could for a moment believe that the law would be so unreasonable. At the time he took possession, nobody else was in possession of the property and therefore he committed no wrongful act in taking possession. If it be said that the plaintiff would not be able to succeed, unless he shows that he or some person, through whom he claims, was in possession up to a date immediately antecedent to the defendant coming into possession, even then the correctness of the principle is not clear. It may be that the plaintiff or the person through whom he claims sold the property, or made a gift of it or abandoned it, and yet it is just possible that the defendant is not aware or is not in a position to prove any of these facts. We do not see the justice of throwing on the defendant, who is in possession, the burden of proving his title under the circumstances. One of the
* [563] *principles of law is that the plaintiff must succeed on the strength of his own title. It was and is open to the defendant merely to say that he is in possession, meaning that he is lawfully in possession and thereby put the plaintiff to the proof that the defendant is not lawfully in possession (see *Danford* v. *McAnulty*[1]). Can the plaintiff succeed without showing that the defendant is unlawfully in possession? If he can show, that while he was peaceably in possession, the defendant went in and took possession without his leave, then he can succeed because the defendant is shown to have committed a trespass, and all trespass implies force in the eye of the law (see the observation of *Cockburn* C. J. in *Asher* v. *Whitlock*[2]). Let us now turn to the cases bearing on the point.

The report of the case of *Allen* v. *Rivington*[3] is rather meagre. It is a case of the time of Charles II. We gather from the report that the defendant, who said he represented the true

1. (1881) 6 Q. B. D. 645. 2. (1865) L. R. 1 Q. B. 5.
3. 2 Wms. Saund. 111 (6th Edn.)

owners of the property, ousted the plaintiff. The title set up was not proved and as it appeared that the lessor of the plaintiff had priority of possession, decree was given in the plaintiff's favour. The Editor's note runs as follows: "This case is evidently in direct contradiction to the well established rule that the plaintiff in ejectment must recover by the strength of his own title without any regard to the weakness of the defendants."

* * * *

The decision in the principal case seems to be confirmed by modern authorities to the extent that actual possession not apparently tortious will furnish a *prima facie* case to the plaintiff in ejectment. The case does not seem to contravene the principle that the plaintiff must recover by the strength of his own title. It rather recognizes the principle that possession is evidence of title as against a wrong-doer. This is the view taken also by the Editor of *Moody and Malkin's Reports.* (See the note to *Doe* v. *Dyeball,*[1] where *Allen* v. *Rivington*[2] and the Editor's note are discussed). In the case of *Doe dem Humphrey* v. *Martin,*[3] the plaintiff proved previous possession and wrongful dispossession by the defendant. Decree in ejectment was given in the plaintiff's favour. In the case of *Doe* v. *Dyeball,*[1] which we have just referred to, the defendant had* forcibly taken * [564] possession of a room. The plaintiff proved a lease to him of the house and a year's possession. Objection was taken that no title in the lessor had been proved. *Lord Tenterdon* C.J. said : 'That does not signify ; there is ample proof ; plaintiff is in possession and you come and turn him out ; you must show your title.' In *Doe dem Harding* v. *Cooke,*[4] the suit was in ejectment. It proved that the plaintiff's lessor and his father before him had held the premises for 23 years and during that time had received and increased the rent. The defendant proved 10 years' subsequent possession. The Court held that the receipt of rent, &c., for 23 years were unequivocal acts of ownership from which the law would presume a lessor in fee. *Tindal* C. J., says: 'The father died seised and the lessor of the plaintiff is the only 'son who is shown to have survived him. That would be enough 'even in a writ of right to call on the tenant to establish a

1. (1829) I Mood. & M. 346.
2. 2 Wms. Saund. 111 (6th Edn.)
3. (1841) Car. & Marsh 32.
4. (1831) 7 Bing. 346 : 33 R. R. 503.

'stronger claim. It is admitted on the part of the defendant 'that this would have been sufficient if the ejectment had been 'brought within a year or two after the lessor of the plaintiff 'had been turned out of possession. But if two years would 'not have preponderated against the lessor of the plaintiff, I 'cannot see why any period short of 20 years should be supposed 'to raise a counter-presumption arising from the first 20 years. 'In many cases it would be extremely hard to cast on the lessor 'of the plaintiff the burthen of showing how the defendant 'came into possession. The lessor of the plaintiff may have 'been an infant or out of the kingdom at the time. The earlier 'presumption therefore must prevail till a better title is shown. It will be seen that the presumption his Lordship is speaking of is the presumption of ownership arising from 20 years' continuous possession. This case was decided before the Statute 3 & 4 William IV, C. 27 (1833), was passed, which statute enacted that the right to land, &c., was extinguished on the determination of the period prescribed in the Act for establishing the same. Even before the passing of the said statute the Courts acted on the presumption that 20 years' continuous possession was evidence of title. *Patterson* J. states in *Doe dem Carter* v. *Barnard*[1]: 'Without the aid of this statute, 20 'years' possession gave a *prima facie* title against every one, and 'a complete title against a wrong-doer who could not show 'any right, even if such wrong-doer had been in possession
[565] *'many years; provided they were less than 20,' and cites this very case of *Doe dem Harding* v. *Cooke*[2] as authority for the proposition. In the case of *Doe dem Smith and Payne* v. *Webber*,[3] the plaintiff, a tenant under a mortgagee, was ejected under colour of a writ for possession obtained against the mortgagor in pursuance of an award given by arbitrators, to which arbitration the mortgagee was no party. The only evidence of title adduced by the defendant was evidence of the arbitration proceedings. The Court held that the evidence was inadmissible as proceedings *inter alia* to which the mortgagee was no party, and held that the plaintiff was entitled to recover possession. In *Doe* v. *Birchmore*,[4] the plaintiff's lessor and one *H* were left in posses-

1. (1849) 13 Q. B. 945.
2. (1831) 7 Bing. 346.
3. (1834) 1 A. & E. 119.
4. (1839) 9 A. & E. 662.

sion by the true owner. One *L* came to reside with and attend upon *H*. *H* died after having devised his interest to plaintiff's lessor. The Court held that the plaintiff was entitled to recover in enjoyment as against *L*, who could not set up a title adverse to *H* as he came in under *H* and against defendants, who intervened claiming under the original owner, but failed to prove their title.

In *Brest* v. *Lever* [1] the action was brought in trespass; the plea of the defendant was *liberum tenementum*. *Parke* B. held that by the plea *liberum tenementum* the defendant admitted that the plaintiff had been in possession and that he himself was *prima facie* a wrong-doer, but he undertook to show a title in himself, which would do away with the presumption arising from the plaintiff's possession, but he failed to do this. In the case of *Doe dem Carter* v. *Barnard*,[2] the facts were these. One Robert Carter purchased premises and was let into possession in 1815 but he did not pay all the purchase money till 1824, and till then no conveyance was executed in his name. In 1815 he allowed his son John to occupy the premises rent-free as tenant at will, and he continued so to occupy till 1834 when he died leaving a widow who was lessor of the plaintiff, and a son and other children. Plaintiff's lessor occupied from her husband's death till a short time before the action was brought. The defendant claimed under a mortgage made by Robert in 1829. The question was whether the plaintiff was entitled to succeed on these facts. The Court rightly held that the plaintiff was not entitled to succeed. In the first *place the engagement by John was permissive as he got into possession as the tenant at will of his father. If John's children had succeeded to the property on the death of their father, they could not have resisted the defendant's claim on the principle laid down in *Doe* v. *Birchmore*[3]. The possession of the widow of John was wrongful and if she had been permitted to remain in possession for 20 years, she would have acquired a parliamentary title, that is, through the Statute of Limitation which would have extinguished the title of the true owners. But she remained in possession only for 13 years. Assuming that her husband's possession was adverse to [566]

1. (1841) 7 M. & W. 593. 2. (1849) 13 Q. B. 945.
3. (1839) 9 A & E. 662.

the title of the true owner, the question arose whether the period during which he had been in possession could be added to the period during which she was in possession. The Court held that she could not do this. It said: 'We apprehend, as before stated, 'such 20 years' possession must be either by the same person or 'several persons claiming one from the other which is not the case here.' One further point to be noted in the case is that it did not appear that the defendant forcibly dispossessed the plaintiff. The case of *Davison* v. *Gent* [1] is a clear one. The Court said that the defendant got into possession either under a sub-tenant of the plaintiffs or as a mere intruder, and in either case the plaintiffs were entitled to succeed on the strength of their previous possession; (see the the judgment of *Bramwell* B. which lucidly states the points for decision and the decision therein.) In *Asher* v. *Whitlock* [2] the facts were these. One Williamson inclosed some waste land in 1842 and in 1850 he inclosed more land adjoining and built a cottage. He occupied the whole till 1860, when he died having devised it to his wife so long as she remained unmarried with remainder to his daughter in fee. On his death the widow and daughter continued to reside on the property and in 1861 the defendant married the widow and came to reside with them. Early in 1863 the daughter died aged eighteen years and the mother died soon after. The defendant continued to occupy the property and in 1865 the daughter's heir-at-law brought ejectment against him. The question was whether the heir-at-law was entitled to succeed. *Cockburn* C.J. put it, the defendant was in a dilemma: either his possession was adverse or it was not. The
* [567] *widow was bound to give up possession to the daughter on her marrying the defendant. If she and the defendant subsequently continued to remain in possession with the permission of the daughter, the defendant could not resist the claim of the heir-at-law of the daughter as he would be estopped from doing it. If on the other hand the widow and the defendant remained in possession after their marriage adversely to the title of the daughter, their position was that of trespassers and all trespass implies force in the eye of the law. They should therefore be considered to have forcibly dispossessed the daughter,

1. (1857) 26 L. J. N. S. Ex. 122. 2. (1865) L. R. I. Q. B. I.

and the heir-at-law of the daughter would be entitled to recover possession on the strength of the previous possession of the testator. It will be seen from the foregoing cases that in none of these cases has it been held that plaintiff is entitled to succeed merely on the strength of his previous possession, unless he shows that the defendant forcibly dispossessed him or traces such possession through himself or some person through whom he claims. If he has lawfully been dispossessed, he has no remedy against a third person not claiming through a wrong-doer (See *Possession in Common Law* by POLLOCK and WRIGHT, page 99, and *Buckley* v. *Gross*[1]). In this last mentioned case, possession of certain property was taken under the orders of a Magistrate acting under statutory powers, and sold by the Receiver of Police to the defendant before the expiration of the time named in the statute. The question arose whether the plaintiff was entitled to recover the price on the mere strength of his previous possession. The Court held that, as the detention was lawful, the receiver and purchaser were accountable only to the true owner if to any one. When the plaintiff was lawfully deprived of possession, his whole possessory right and title, such as it might be, was determined. We do not think that any detailed examination of the Indian cases on the subject is necessary. The following cases: *Khajah Enaetoollah Chowdhry* v. *Kishen Soondur Surma*,[2] *Brojo Sunder Gossami* v. *Koilash Chunder Kur*,[3] *Krishnarav Yashvant* v *Vasudev Apaji Ghotikar*,[4] *Ayesha Beebee* v. *Kanhye Mollah*,[5] *Mohabeer Pershad Singh* v. *Mohabeer Singh*,[6] *Cutenho* v. *Souza*,[7] were cases of dispossession. In the case of *Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar*[4] the defendant had taken possession through the Court as purchaser in execution of a decree* against a third person. In regard to the effect which has been given to S. 9 of the Specific Relief Act as barring suits based on mere possession, it appears to us that the decisions (*Debi Churn Boido* v. *Issur Chunder Manjee*[8] and *Ertaza Hossein* v. *Bany Mistry*,[9] followed [568]

1. (1863) 3 B & S 566.
2. (1867) 8 W. R. C. R. 386,
3. (1882) I. C L. R. 133.
4. (1884) I. L. R. 8 B. 371.
5. (1869) 12 W. R. C. R. 146.
6. (1881) I. L. R. 7 C. 591.
7. (1862) 1 M. H. C. R. 15.
8. (1882) I. L. R. 9 C. 39.
9. (1882) I. L. R. 9 C. 130.

with hesitation in *Purmeshur Chowdhry* v. *Brijo Lall Chowdhry*[1] proceed on a misapprehension of what the Privy Council said in *Wise* v. *Ameerunissa Khatoom.*[2]

As to the question how far the defendant by proving *jus tertii* can defeat the plaintiff's claim, it appears to us on the principles enunciated above, that if the defendant shows that the title to the property sued for is in a third party, the presumption of the plaintiff's title arising from his previous possession ceases to arise, because an inference arising from presumption is resorted to only if there is no actual proof before the Court. In the case supposed by us there is actual proof as to who the true owner is, and consequently even if the plaintiff succeeds in showing that he was in previous possession and was forcibly ousted by the defendant, who cannot show that he is acting under the authority of the true owner, the plaintiff cannot succeed on the ground that the title should be presumed to be in him. He can succeed only on the strength of his previous possession and subsequent forcible ouster by the defendant. His possession is good against everybody but the true owner, and if the defendant cannot show that he claims through the true owner, he cannot retain the possession, which came to him through his own wrongful act. This is well put in the argument of Markby in *Asher* v. *Whitlock*[3]. He says the authorities are conclusive to show that a person in peaceable possession of lands has, as against every one but the true owner, an interest capable of being inherited, devised or conveyed. In India as there is special provision for bringing suits based on mere possession irrespective of title, (S. 9 of the Specific Relief Act), such suits should be brought within six months after dispossession. Otherwise the suit would fail. Before concluding we would merely refer to the principle that a person suing either in trespass in England or under the provisions of the Specific Relief Act in India must show that he has been in undisturbed possession for a reasonable time. If he is a mere trespasser himself he cannot by the mere act of trespass gain a possessory title to the property in dispute. *Brown* v.
[569] * *Dawson*[4] is a good illustration of this principle. In this case

1. (1889) I. L. R. 17 C, 256.
2. (1880) L. R. 7 I. A 73.
3. (1865) L. R. 1 Q B. 1.
4. (1840) 12 A. & E. 629.

the plaintiff, a schoolmaster, had possession of the school-room for the purposes of his office but was summarily dismissed by the trustees. He gave up the room which was taken possession of by them and locked up. He returned on the next day, broke open the room and held it for eleven days at the end of which the trustees forcibly ejected him. He then brought the present action in trespass. The Court held that the plaintiff had not by his re-entry a *prima facie* right of possession against the trustees as wrong-doers. *Lord Denman* C. J. said : 'We agree also that 'this action is possessory and that possession is sufficient for the 'plaintiff in trespass against a wrong-doer. But these elemen- 'tary principles must be understood reasonably. A mere tres- 'passer cannot by the very act of trespass immediately and with- 'out acquiescence give himself what the law understands posses- 'sion against the person whom he ejects, and drive him to produce 'his title, if he can without delay reinstate himself in his former 'possession.'

[Whatever may have been the view taken in earlier cases it may now be taken to be definitely settled that possession is *prima facie* a good title in itself and that it will avail as against every person other than the true owner. The decision of the Judicial Committee in *Sundar* v. *Parbati*[1] has led up to this result. Dealing with the question of joint possession by two widows and the cases of *Asher* v. *Whitlock*[2], etc., their Lordships of the Privy Council observed [3]: "Their Lordships are at a loss to understand, at all events, to appreciate, the grounds upon which the Chief Justice endeavours to differentiate between the authorities which he cites, the import of which he correctly states, and the position of the parties to this action. Their possession was lawfully attained, in this sense, that it was not procured by force or fraud, but peaceably, no one interested opposing. In these circumstances, it does not admit of doubt that they are entitled to maintain their possession against all comers except the heirs * * one or other of whom is the only person who can plead a preferable title. But neither of these possible claimants is in the field, and the widows have therefore, each of them, an estate or interest in respect of her possession, which cannot be

1. (1889) I.L.R. 12 A. 51.
2. (1865) L.R. 1 Q B. 1.
3. (1889) I.L.R. 12 A. pp. 56, 57.

impaired by the circumstance that they may have ascribed their possession to one or more other titles which do not belong to them."

Following the above case the Allahabad High Court has held that a person in possession of land without title has an interest in the property which is heritable and good against all the world except the true owner, an interest which, unless and until the true owner interfered, is capable of being disposed of by deed or will or by execution sale—see *Wali Ahmad* v. *Ajudhia*[1]; *Gobind Prasad* v. *Mohan Lal*[2]; *Pahlwan Singh* v. *Ram Bharose*[3]. The principle laid down in the above cases has not been departed from in the later case of *Shi Gopal* v. *Ayesha Begam*[4] although the two learned Judges who decised that case differed from each other in the application of the above principle to the facts before them. It is not here necessary to consider which of the two learned Judges was correct in his application of the principle. But it may be stated that Mr. Justice *Knox* loses sight of the circumstance that the plaintiffs were claiming as heirs of the person in possession along with the defendant so that they come within the principle stated by him that to entitle plaintiffs to maintain a suit "the persons from whom they derived title were in possession at the time when the trespasser entered upon possession." Surely when one of the heirs claims to have exclusive possession he must be regarded as a trespasser so far as regards the other joint-heirs.

The Bombay High Court has maintained the view above stated ever consistently. See *Fatan* v. *Ernad Asla*[5]; *Ali* v. *Buchubibi*[6]; *Hanmantrav* v. *The Secretary of State for India*[7] *Pestonji* v. *Nemchand*[8]. Cf. also *Bhagwan Singh Daulat Singh* v. *The Secretary of State for India*[9]. In Madras, until the case of *Mustapha Saheb* v. *Santha Pillai*[10], theview was that possession in itself was not the foundation of a right to sue except under S. 9 of the Specific Relief Act. In that case Mr. Justice *Subrahmanya Aiyar* held that possession in law was a substantive right and would entitle the person to maintain it as against all but the true

1. (1891) I. L. R. 13 A. 537 (F. B.)
2. (1901) I. L. R. 24 A. 157 (158, 159.)
3. (1904) I. L. R. 27 A. 169 (171)
4. (1906) I. L. R. 29 A 52.
5. (1901) 3 Bom. L. R. 246.
6. (1903) 5 Bom. L. R. 264.
7. (1900) I. L. R. 25 B. 287.
8. (1907) 9 Bom. L. R. 1301.
9. (1906) 10 Bom. L. R. 571.
10. (1899) I. L. R. 23 M, 179.

owner. Ever since the decisions in Madras have been uniform in maintaining this view. See *Narayana Row* v. *Dharmachar*[1]; *Kocherlakota Venkatakristna Row* v. *Vadrevu Venkappa*[2].

The Calcutta High Court seems to hold that mere proof of possession without proof of title will not, except in a suit under S. 9 of the Specific Relief Act, entitle a plaintiff to a decree for recovery of possession. The latest case upon the subject in that Court is that of *Nisa Chand Gaita* v. *Kanchiram Bagani*[3].

The above question is different from the question whether possession is presumptive evidence of ownership, *i. e.*, of title. It has been statutorily enacted that possession is, in the absence of proof to the contrary, *prima facie* evidence of title (see S. 110 of the Evidence Act) and this doctrine has been followed by the several High Courts[4]. We do not think the Calcutta decisions which hold that mere proof of possession will not entitle a plaintiff to succeed except in a suit under S. 9 of the Specific Relief Act[5] are in any way against this view. That possession is evidence of title is declared by statutory enactment in S. 110 of the Evidence Act. But this is only a presumption, and that, a rebuttable one. Hence where it is shown that somebody else has the title, the plaintiff cannot succeed upon the mere strength of his possession. This is the view of the Calcutta High Court. :—Ed.]

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* PARASARA MADHAVIYAM. * [573]

The qualities of the maiden being thus examined, (her) family should also be examined. Hence, Manu (says) [6] :—"In respect of connection by marriage, one should avoid these ten familes though they may be great, and rich in kine, goat, sheep, wealth, and corn *i.e.*, (family) neglecting (or without) sacred rites: (family) having no males (surviving); (family) devoid of Vedic (study) (family in which the members have) long hairs [7] and

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1. (1902) I. L. R. 26 M. 514.
2. (1903) I.L.R. 27 M. 262 at p. 270.
3. (1899) I. L. R. 26 C. 579 (585).
4. *Bhikhi Rai* v. *Udit Narain Singh* (1903) I.L.R. 25 A. 336 (370); *Rajaram* v. *Nemchand* 5 Bom. L.R. 225; *Bhagwant Singh Daulat Singh.* v. *The Secretary of State for India* ( ) 10 Bom. L. R. 571. *Nawab Ajajuddin Alli Khan* v. *Secretary of State for India.* (1904) I. L. R. 28 M. 69.
5. See *Purmeshur Chowdhry* v. *Brijo Lall Chowdry* (1889) I.L.R. 17 C. 256 where the previous decisions are referred to and *Nisa Chand Gaita* v. *Kanchiram Bagani* (1899) I. L. R. 26 C. 579.
6. Ch. III 6 and 7
7. (*i. e.*) on the body (not on the head):—Ed.

suffer from piles : and families (in which the members are) consumptive, dyspeptic, epileptic, afflicted with white leprosy and leprous.', "Neglecting (or without) sacred rites," *i.e.*, devoid of sacrificial and other ceremonies." Having no male members, *i.e.*, with women as the only survivors [1]
* [574] "Devoid of Vedic (study)" *i.e.* * who do not study (Vedas). Also Yama:—" These fourteen families should be marked as unfit for marriage. Among Brahmins and priests who officiate at sacrifices, (the family) having no *arsha* should be avoided. The family, (whose members are) too tall, too short, and of deep color should be avoided. Families (whose members are) wanting in a member of the body or having too many, dyspeptic, afflicted with white leprosy, leprous, &c., should be avoided. Families, (whose members are) always lustful, should be avoided, as also a family consisting of hairy people. Also an epileptic family and a family afflicted with jaundice." "*Having no arsha*," *i.e.*, whose *pravara* is not known. The object of avoiding (familes) "neglecting sacred rites" &c., is to avoid offspring of that kind—for *Harita* says[2] : "The offspring is born as befits the family." Also in a *Purana* "The son takes after the maternal uncles: and the maiden (daughter) takes after the fathers. Of whatever nature the mother is, of the like nature will the son be." Also Manu[3] :—" A man of low birth[4] partakes of the nature of his father or of his mother, or of both : but under no circumstances will he give up his own (evil) nature." The family to be avoided has been mentioned.

As to the family which ought to be chosen, *Yajnavalkya* says[5] :—" From a great family of *Srotriyas* (*i.e.*, those who study Vedas) famous for ten generations." Where a family whose members have been famous for five generations on the father's side and five on the mother's, such family is (said to be) famous for ten generations. From such a great family *i.e.*, which is rich in children, cattle &c. let him marry a maiden. Also Manu[6] :—

1. Kulluka Bhatta explains this expression as meaning family producing no male children but only female children :—[ED].
2. Ch. II § 13.
3. Ch. X. § 59. Dutt p. 373.
4. [As the matter dealt with just before and after this verse is with reference to men of low birth the first sentence in Sanskrit although general is translated as specially dealing with such men :—Ed.]
5. Ch. I. § 54.
6. Ch. IV. § 244. Dutt p. 168.

"One, who wishes that his family should rise, should always form connections with superior families and avoid inferior ones." On this point, he (Manu) himself mentions which are superior:—"Those, who are pure by (the performance of) sacred rites laid down by *Srutis* and *Smritis*: who have maintained *Brahmacharya* inviolate: who are born in great families: who are connected with great families: who are recognised as great (or always associated with great men): are contented: are good to good people: are good: are impartial: are devoid of covetousness, greediness, hatred, envy, pride, delusion (or frenzy or infatuation) &c.,: are not irascible and are easily appeased, should always be made connections by marriage." The same (authority) mentions the inferior (families):— "Thieves, * informers, the impotent, (those) who lead the lives of atheists, [*575]
who live by a profession not appropriate (to their caste), who are deformed, who are at bitter enmity with the brave, who have committed offences against the king, who habitually take away the property of Brahmins, and misers, are condemned. Let him also carefully avoid families, where married women are childless, give birth only to girls and kill their husbands." The rule, specifying the bridegroom to whom a maiden may be given, is stated by *Gautama*[1] :—"Let him give to one who is possessed of learning, of good conduct, having relations, good marks and good disposition."

Also *Yama* :—"A maiden should be given away by wise persons after examining these seven qualities—ancestry (family), disposition, the person, age [2], learning, wealth, and the existence of capable members (in the family),—the rest need not be considered." *Yajnavalkya* [3] :—"A bridegroom (should be) endowed with the very same qualities, be of one and the same caste, be a *Srotriya* (one who has studied the Vedas), be carefully examined as to his virility, and be youthful, intelligent, and popular." "*Endowed also with the very same qualities*" *i.e.*, the qualities set out regarding the maiden.[4] The method of ascertaining virility is described by Narada.

1. IV. §. 6. S. B. Vol. II p. 194.
2. The Telugu Edition has "reputation." instead.
3. Ch. I § 55. Dutt. p. 10.
4. Ch. I § 54. Dutt. pp. 9 & 10.

[*Translator's Note.*—Here follow an extract from *Narada* as to the mode of ascertaining one's virility, and *Madhava's* commentary on Narada's text.]

This ought to be understood after examination (or ascertainment). The same (authority *Narada*[1]) gives the reason for this:—" Women were created to bring forth offspring. Woman[2] is the field and men the seeds. The field should be given to one who has seed and one who has no seed does not deserve the field."

Katyayana mentions others who should be avoided in the same way as the impotent:— " A maiden should not be given by the wise to those who live at a distance, who have no learning, who follow the path leading to the final emancipation of the soul, who are valorous, and who are without property."

But to what kind of man should she be given? Thus Manu says[3]: " To a bridegroom who is superior[4] handsome, and equal,[5] to such a one let him give according to proper
* [576] rites the maiden, though she has not arrived at* (the marriageable) age." "*Not arrived at*" *i.e.* not of a marriageable age *i.e.*, a young girl. [Mâricha states the praiseworthiness (pre-eminence) (of such a marriage)[6]]. " After the fifth year from birth or conception, the choice of girls, (their) gift and investiture with the girdle is very proper[7]" (or auspicious.)

Also *Baudhayana*[8] :—" Let him give the maiden who has not attained puberty to a *Brahmachari* possessing good qualities; or even to one void of (good) qualities: but let him not detain one who has attained puberty."

But as to what is stated in Manu's[9] text[10]—" Let a maiden rather remain in her (parental) home even unto her death,

1. Ch. XII § 19 : Jolly p. 82.
2. Used to denote the class *i. e.* womenkind.
3. Ch. IX § 88 Dutt. p. 326.
4. *i.e.* in family. achara &c. (Kulluka) :—Ed.
5. *i.e.* in caste. of equal caste (Kulluka) :—Ed.
6. Some omit this.
7. This sloka is not in the Telugu Edition.
8. Baudhayana Smriti IV, 1 § 11.
9. The reading संमेतु is apparently a mistake for मनुना.
10. Ch. IX § 89 Dutt. p. 327.

though she may have attained puberty: but let him not give her under any circumstances to one void of good qualities" its chief aim or object is that when one possessing good qualities is available, he should not give a maiden to one devoid of them; but not the prohibition under all circumstances of one devoid of good qualities; for otherwise the inferior alternative (Anukalpa[1]) prescribed by *Baudhayana*[2]—" or even to one void of good qualities"—would have no scope. The purport of the text[3] " let her remain though she may have attained puberty", is, as explained above, not its (literal) meaning, for it will be at variance with (the text[2]) " let him not detain one who has attained puberty." Hence also *Vasishta* says[4] :—" Let a father give away a maiden, who has not attained puberty, for fear she should attain it (unmarried): for if she remain (at home) after attaining puberty, the fault will be (or go to) the father's." Also *Samvarta*[5]:—"At the time when the hair[6] appears[7] (*i.e.* of puberty or on the appearance of the hair) the maiden is enjoyed by *Soma* : on the appearance of menses, by *Gandharva* ; and on the appearance of the breasts, by *Agni* : let him therefore get the *kanyâ* (maiden) married before she attains puberty[8]." By the word *kanyâ* is intended to be expressed a girl of an age when she is not conscious of shame and other marks. Thus in *Vâyu Purana* :—" *A kanyâ* is a *kanyâ* only so long as she in the presence of a man does not owing to a sense of shame cover her limbs, &c." Also the author of *Sangraha* :—" So long as she does not wear a cloth, so long as she is playing in the dust, so long as she is not conscious of any impropriety (of behaviour), till then is she a *kanyakâ*."[9]

* *Marichi* mentions the degrees of merit (accruing) to the giver, according to the difference in the age (of the maiden) :— * [577]

1. अनुकल्प or गौणपक्ष.
2. Baudhayana, Smriti IV, I § 11.
3. Manu IX § 89.
4. XVII § 70 Dutt p. 800.
5. Samvarta I § 66. Dutt, p. 340.
6. The appearance of the streak of hair above the navel in a maiden shows sign of puberty (यौवनकाल.)
7. Another reading is कामकाले *i.e.*, at the time when sexual desire (arises.)
8. ऋतुमती " So that she may not have attained her course" ; but to give effect to the commentary we must take it that it is intended here that she must be given in marriage before the appearance of the hair which is the mark of puberty.
9. The Editor of the Calcutta Edition says that this sloka is not found in manuscripts.

" By giving a *gauri*, he will attain the uppermost heaven : by giving a *rohini*, *Vaikuntha* (the heaven of *Vishnu*) : by giving a *kanya*, the abode of Brahma : and by giving a *rajasvala* (one who has attained puberty), he will go to *Raurava* (hell.)" Samvarta has pointed out the meanings of the words *gauri* &c.[1] :—" (A girl) of eight years is a *gauri* : of nine years, a *rohini* : of ten years, *kanya* : over that, *rajaswala*." Also Yama[2] : —" In her eighth (year) she is a *gauri* : in her ninth she is a *nagnika* : in her tenth she is said to be a *kanya* : and in her twelfth (year) she is designated by *Smritis* to be a *Vrishali*."

Narada[3] mentions the different donors (persons entitled to make a gift) distinguishing between the primary and the secondary :—" The father shall himself[4] give away the maiden ; or a brother with the father's consent : likewise, the maternal grandfather, the maternal uncle, a *sakulya* (agnate) and a *bandhava* (cognate). In the absence of all (these) the mother, if in the natural state. But if she be not in her natural state, the sapindas[5] shall give away the maiden. When there is nobody at all, the maiden shall resort to the king." Also *Yajnavalkya*[6] :—" Father, paternal grandfather, brother, a *sakulya*, and mother (in succession) if in possession of their faculties are the givers of the girl, each succeeding person becoming the giver, in default of the preceding person : and on failure to give her away, incurs (the sin of) fœticide at each appearance of her courses. In the absence of givers, the maiden shall herself choose an eligible husband." "Eligible" *i.e.*, fit for cohabitation, *i.e.*, endowed with such qualities, as, being of the same caste, &c. And thus *Narada*[7] :—" With one of the same caste, suited (to her) by parentage, disposition, strength, and sacred learning, let her co-operate in spiritual matters, and by him, let her beget children." Here the passage " *having obtained* a man of the same caste " should be supplied and the passage construed. And this should be understood (to be the rule) if there be no

1. Samvarta I § 66 : Dutt p. 340.
2. Dharma Sastra Sangraha, Calcutta Edition p. 589, Sl. 66. The reading is slightly different.
3. Ch, XII. § 20, 21. and 22 : Jolly pp. 82 83.
4. i.e. without consulting any other :—ED.
5. This is according to the reading सनाभय: According to another reading स्वजातय: people of her caste :—ED.
6. Ch. I, § 63 and 64 : Dutt p. 10,
7. Narada Smriti Ch. XII, § 13.

appearance of the menses. But after the appearance of the menses, though the father and others are in existence, she should await her father's orders for some* time, and if he continues, to be indifferent, she shall herself choose a bridegroom. So says *Baudhayana*[1]:—" One whose menses have appeared shall, await her father's orders for three years: and in the fourth year she shall take a husband who is (her) equal ; in the absence of one who is her equal, she shall join even one who is wanting in good qualities." Also Manu[2] :—" An unmarried damsel whose menses have appeared shall wait for three years: after this period, she shall take a husband who is (her) equal. If, not being given away, she herself takes a husband, she commits no sin, nor does he whom she takes." The meaning is that the person also, whom she takes as her husband, is not guilty of any sin. *[578]

But as to the text of Vishnu[3] :—" The *kanya* (*i. e.*, maiden) herself shall choose, only after waiting for three courses,"—this should be understood as applying to cases in which a bridegroom endowed with good qualities is available. But how is it that the word '*kanya*' has been applied to one whose menses have appeared ? For, *Yama* says[4] :—" A girl of ten years is a *kanya*," and menses do not appear at the tenth year. This is not a fault (or defect) as *Yama* has given a technical sense to the word *kanya* as he has given to *gauri*, &c., and has used it technically in (the texts) stating the (degree of) merit and in other (passages). And this (text) has been already quoted[5]—" giving a *kanya* (he attains) the abode of Brahma." The word *kanya* in common *parlance*, however, denotes any unmarried woman[6]. If this is so taken the word *kanya* used in different places in the sastras will have a meaning (or has a signification attached to it). Thus in *Anusâsanika*[7], in the episode of *Ashtâvakra*, it has been applied to an old woman :—" I am celibate from maidenhood or youth. Therefore there is no doubt, I am only a *kanya*." Also in *Salya Parva*[8] it has been applied by *Narada* to an old woman :—" O blameless one, how will you who have not received the

1. Baudhayana Smriti IV, i § 14.
2. Ch. IX, § 90 and 91.
3. Ch. XXIV, § 40 : Dutt p. 875.
4. See p. 450 Ante.
5. This is ascribed to Marichi p. 449 Ante :—Ed.
6. Literally:—" The word kanya is, however, generally known as denoting any unmarried woman"—Ed.
7. Mahabharata Anusasanika Parva 20 Adhyaya § 21.
8. Ibid, Salya Parva, 51st Adhyaya § 10.

marriage) sacrament and are a *kanya* (attain) the worlds (of the blessed.)?" Also in *Umamahesvara Samvada* :—"She who is pure having bathed after her courses is said to be a *kanya.*"

But is not the statement in the text "who have not received the (marriage) sacrament," that an unmarried woman will not attain the excellent world (heaven) undemonstrated (or inadequately supported) inasmuch as women who discourse
[579] on Brahma, even though unmarried, may attain the *excellent world (*i. e.* heaven) by *Upanayanam*, religious study, &c.? Hence *Harita* says[1] :—"Women are of two kinds—those who discourse on Brahma and those who become brides at once. Of them, to those who discourse on Brahma are ordained, *Upanayanam*, kindling the (sacred) fire, and begging for alms in their own house. And as to those who become brides at once, their marriage should be performed, after somehow getting through the *Upanayanam* alone, when the time for marriage is come."

Not so: because that (text) has reference to another *Kalpa* (*i. e.* age). And so *Yama* :—"In a former *Kalpa*[2], *Upanayanam* was prescribed[3] for (girls) and likewise, learning the Vedas and recital of the *Savitri*. The father, paternal uncle, or brother should teach her; but not a stranger. And begging for alms is ordained to a maiden in her own home. She shall avoid being clothed in skin (or leather) or bark and wearing them atted hair."

The time for marriage is stated by the text[4] beginning with "one of eight years is a *gauri*."

The various (forms of) marriage will now be expounded: Here Manu says[5] :—"Listen to a brief (account of) these eight (forms of) marriage of women among all the four castes, (some of) which are advantageous, and (others) disadvantageous, in this world and after death: *Bráhma*, *Daiva*, *Ârsha*, *Prâjâpatya*, *Âsura*, *Gândharva*, and *Râkshasa*, and *Paisâcha* regarded as the eighth." The same (authority) defines them in due order[6] :—"To clothe a

1. Harita Smriti § 20, 21.

2. *Kalpa* is a day of Bramha which consists of 1000 yugas :—Ed.

3. The verb is इष्यते (Ishyate) not past but only passive :—Ed.

4. *i.e.*, that of Yama cited at p. 450—Ed.

5. Ch. III, § 20 and 21.

6. Ch. III, § 27 to 34.

maiden, bedeck her, and give her away of his own accord (*i. e.*, without having been solicited) to a man possessing Vedic learning and good disposition, after having invited and honored him, is stated to be the *Brahma* rite. The gift of a daughter, after she is adorned to a priest who is officiating properly at a sacrifice while it is being offered, is called the *Daiva* rite. The gift of a maiden, according to the rule, after having lawfully received a cow and a bull, or two cows and two bulls, from the bridegroom, is said to be the *Ârsha* rite. The gift of the maiden after honoring the bridegroom, and telling them 'do you both co-operate in spiritual matters,' is designated by smritis as the *Prâjâpatya* rite. The gift of the maiden, at his (donor's) pleasure, after money has been paid to the kinsmen and to the maiden according to his (*i. e.* bridegroom's) means, is said *to be the [580]
Âsura rite. Union of the maiden and the bridegroom with each other, by (mutual) desire, should be understood to be the *Gandharva*, having its origin in love and brought about by sexual union. Taking away a maiden by force from her home, while she is screaming and crying, after killing, cutting, and splitting, is said to be the *Râkshasa* rite. That marriage in which one has connection with a maiden who is asleep, intoxicated, or disordered in intellect, is the eighth and most sinful of the marriages and is said to be the *Paisâcha*". Also Narada[1]:—"Of them, *Brâhma* is the first: and after it *Prâjâpatya*: and then *Ârsha* and *Daiva*, and *Gândharva*, and likewise *Âsura*: *Râkshasa* is next after it: and *Paisâcha* regarded as the eighth."

Manu[2] fixes the forms of marriage (appropriate to each) in due order of castes:—"One should understand as lawful, the first six to the Brahmin: the last four to a Kshatriya: the same, with the exception of *Râkshasa* to Vaisyas and Sudras." The first six (forms of) marriage are lawful to a Brahmin. The last four beginning with *Âsura*[3] are lawful to a *Kshatriya*. The same with the exception of *Rakshasa* (are lawful) to Vaisyas and Sudras.

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1. Ch. XII, § 39, 40. Jolly pp. 84, 85.
2. Ch. III, § 23.
3. The reading here adopted is आसुरादयश्चत्वारः पाश्चात्याः According to another reading पाश्चात्याः should be पैशाचान्ताः The meaning then is this:—The four beginning with Asura and ending with Paisacha.

The same (authority) mentions[1] those which are commendable out of these (forms) beginning with the *Brâhma*:—"The sages (the wise) state that the first four are commendable to Brahmins: one, *Râkshasa*, to Kshatriyas: *Âsura*, to Vaisyas and Sudras." Also in another Smriti:—"The first four are commendable to Brahmins: *Gândharva* and *Râkshasa* to Kshatriyas: and *Âsura* to Vaisyas and Sudras: but the last is condemned:" "Is condemned:" the meaning is, *not commendable to anybody*. *Samvarta*[2] allows even *Paisâcha* to Brahmins &c[3]., when no other (form of) marriage is available:—"Let a good maiden, whom a man cannot secure by any means, be married even by a stealthy marriage, when she is alone."

Manu states[4] the merit to be gained by *Brahma* and other (marriages):—"A son born of a woman married in the *Brâhma* form, performing good acts, will save from sin (these) *generations*[5]—ten ancestors, and ten descendants in his family, and himself

[581] *the twenty-first. A son born of a woman married in *Daiva* form (will save) seven ascendants and seven descendants. A son born of a woman married in the *Ârsha* form (will save) three before) and three (after). A son born of a woman married in the *Prâjâpatya* form (will save) six (before) and six (after)."

It is only in the first four forms of marriage beginning with *Brahma*, that sons are born radiant with Brahminic sanctity, approved by good men, possessing beauty, strength and good qualities, rich, famous, having ample worldly enjoyment, and virtuous: and they live a hundred years. But in the remaining bad marriages, are born sons, who are cruel, speak untruth, and hate the Vedas and religious duty."

Even among the four commendable forms of marriage, each preceding one is superior. Here Baudhayana says[6]:—"Of them, the first four to a Brahmin: and even among these each preceding one is superior. Of the last, each succeeding one is more sinful."

But is not the *Ârsha* form too, sinful like the *Âsura*.

1. Manu Chapter III § 24.
2. Some read Vatsa.
3. The Telegu Edition has "Kshatriyas &c." instead.
4. Ch. III. § 37 to 41.
5. The Sanskrit word is पितॄन्. It is used as illustrative and must not be taken literally. It is, therefore, not confined to ancestors.
6. Baudhayana Smriti Prasna I Kanda ii, Sutra 2 § 10, 11

being similar, in that (the bride) is obtained for a price? Thus Kasyapa says[1] :—"The woman who is bought for a price is not called a *patni* (*i. e.*, wife co-operating with her husband in religious rites.) She (does) not (co-operate as wife) in the rites relating to *Devas* nor in those relating to the Manes[2] : Kasyapa calls her a slave (*Dâsi*)." Manu too being of opinion that the *Ârsha* is unlawful as the bride is bought for a price, says :— 'Of the five, three are lawful and two are here ordained as 'unlawful : the *Paisâcha* and the *Âsura* should never[4] be performed." Of those beginning with the *Brâhma* and ending with the *Âsura*, three—the *Brâhma*, and *Daiva* and the *Prâjâpatya*—are lawful, as there is no purchase: two, the *Ârsha* and the *Âsura* are unlawful as (the bride) is bought for a price. Of these two, the *Âsura* like the *Paisâcha*, should not be performed even in distress.

Not so; for, the object of the text[5] "of the five" is to set out another doctrine. Why is it so? For, he himself, later on, repeats[6] as another doctrine that a cow and a bull are *Sulka*[7] and forbids (their being so designated). "Some authors say that a cow and bull *in the *Ârsha* (form) are *Sulka*: but this is simply wrong. A sale is only (if there is variation in price) from small to large. But this (*viz*, *Ârsha* marriage) takes palce only by this (cow and bull which are constant)[8]." As to the statement of some that a cow and bull are *Sulka*, that is wrong. It (*i. e.*, cow and bull) cannot be *Sulka* as it has not the characteristics of *Sulka*.[7] For the characteristic of *Sulka* is the state of not having a fixed or constant value : because that (characteristic) is to be found in sale. For, the price wherewith a purchase is effected becomes greater or less according to the time, the locality &c.,[9] In the case in question, however, the value or number (lit. measure) is constant : for the *Ârsha* is

* [582]

1. Kasyapa Smriti § 49.
2. The Calcutta Edition reads "Sarindaship" instead of "those relating to the Manes."
3. Ch. III, § 25.
4. The Calcutta Edition reads instead of "never," "under no difficulties."
5. *i. e.*, of Manu. *i. e.*, Ch. III § 25.
6. Ch. III, § 53.
7. *i. e.*, price :—Ed
8. Manu III, § 53.
9. By this it is intended to indicate that the variation in price is also due to the subject-matter of sale : —Ed.

effected by this much only[1] *viz.*, a bull and cow, but not in any other manner. Therefore, there being no purchase for a price, the *Ârsha* (form) is virtuous. Hence *Devala* says :—" The first four (forms of) marriage which are brought about by pouring water are virtuous: they have no *Sulka* (price) and are proper for Brahmins, and save both families."

C. C.

CRITICAL NOTES.

Sir Niwas Ram Pande *v.* Udit Narain Misr.— I.L.R. 13 A. 330. *Interest post diem in mortgages.* The Allahabad High Court decided in this case that interest *post diem* on a mortgage bond for a term certain, and containing no express provision as to *post diem* interest, is nothing else than damages for breach of contract, and that, in respect of such interest given by way of damages, there is no distinction between simple bonds and mortgage bonds, as to the period of limitation within which an action should be brought. The learned Judges are fortified in their conclusions by the authority of two earlier cases decided by the same Court—*Mansab Ali* v. *Gulab Chand*[2] and *Bhagwant Singh* v. *Daryao Singh*[3]—in which both the questions were decided against the plaintiff-mortgagee. Upon the first question, whether, where interest is specified up to a day certain a contract could be implied for the continuance of the same rate of interest until payment, the authorities both in England and in India seem to be decisive. The opinion seems to have at one time prevailed that interest *post diem* could be awarded. (See MAYNE on *Damages*, p. 149) ; but the later current of authority is against it. In the leading case of *Cook* v. *Fowler*[4] Lord Selborne said : "Upon a contract for payment of money borrowed for a fixed period, on a day certain, with interest at a certain rate down to that day, a further contract for the continuance of
[583] the same rate of interest after that day* until actual payment. is not to be implied, unless there is something to justify it upon the construction of the words of the particular instru-

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1. Madhava in commenting upon the text Manofu takes तावतैव and not तावदेव which is the reading in Manu's text.
2. (1887) I. L. R. 10 A. 85
3. (1889) I. L. R. 11 A. 416.
4. (1874) I.L.R. 7 H. L. 27,

ment. And although in cases of this class, interest for the delay of payment *post diem* ought to be given, it is on the principle not of implied contract but of damages for the breach of contract." *Lord Cairns* added: "No doubt *prima facie* the rate of interest stipulated for up to the time certain might be taken as the measure of interest, but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case and to decide what was the proper sum to be awarded by way of damages.' The Madras High Court held in two cases, *Bandaru Swami Naidu* v. *Atchayamma*[1] and *Ramachandra* v. *Devu*[2], that the stipulated rate of interest should be allowed up to date of decree; see also *J. Carvalho* v. *Nurbibi*[3]. The Calcutta High Court, however, was of opinion that it was at the discretion of the court to award under S. 209, C. P. C., whatever rate of interest was fair in its opinion. But it does not appear in these cases whether the document sued on provided interest up to a day certain or up to the date of realisation. They do not, consequently, furnish any guide in the determination of the question whether interest *post diem* is payable at the stipulated rate.

The authority of the long current of English decisions and of the House of Lords is great. And we do not mean to impugn it. But does it necessarily follow that the same rule must be followed in India? Even in England the rule laid down in *Cook* v. *Fowler* [4] does not appear to be inflexible. There seem to be numerous exceptions to it. Even where there is no stipulation to pay interest, the law of England allows it upon mercantile securities, or where such a provision is to be implied from the usage of trade or from the dealings between the parties—see *Foster* v. *Weston*[5] and *Higgins* v. *Sargent*.[6] Mr. Mayne says in his book on Damages, p. 149, that "it is now established as a general principle that interest is allowed by law upon mercantile securities or where a promise is to be implied from the usage of trade or other circumstances." In the case of equitable mortgages by deposit of title deeds without stipulation of interest, it was held that an agreement to pay interest was to be implied. *Sir*

1 (1881) I. L. R. 3 M. 125.
2. (1889) I. L. R. 12M. 485.
3. (1879) I. L. R. 3 B. 202.
4. (1874) L. R. 7 H.L. 27.
5. (1830) 6 Bing 709.
6. (1823) 2 B. & C. 348: 107 E. R. 414.

W. M. James, *V.C.*, said in *In re Kerr's Policy*,[1] following *Carey* v. *Doyne*:[2] "I think that a deposit of title deeds to secure a loan is to be considered as an agreement to execute a mortgage of the property comprised in the deeds with interest." And in *Lippard* v. *Ricketts*,[3] where certain costs were made an equitable charge on property, the Court held that they bore interest at 4 per cent. See also *Macleod* v. *Jones*[4]. Again in *In re Roberts*,[5]
[* 584] *Cotton* L. J. said: "It is only * necessary for me to add that we are not deciding now *what rate of interest should be allowed in a suit for redemption*, but simply on an action brought for breach of covenant to pay the money on a given day." In *Morgan* v. *Jones*[6] and *Price* v. *G. W. Ry. Co.*,[7] the Court of Exchequer implied a covenant to pay interest beyond the time fixed and in the latter case awarded the high rate of 10 per cent.

If such is the state of the law in England, the question arises, whether a contract could be implied to continue the stipulated rate of interest beyond the term fixed, if there is nothing in the circumstances of the case to suggest the contrary. It may be that where the interest stipulated is much below the market rate, there is no implication that that rate should alone be continued even beyond the date fixed. But can it be denied that what the parties in this country understand when interest is stipulated up to a time fixed for payment is, that the same rate is to continue until the actual realization of the money? It was suggested by *Lord Cairns* even in *Cook* v. *Fowler*[8] that the measure of damages would ordinarily be the stipulated rate. If Courts of Equity in their equitable jurisdiction would override the strict rules of the common law courts, and where the debtor seeks the aid of a Court of Equity, compel him to pay the stipulated rate, except where it is unconscionable, up to the time of redemption, why should not courts in India, which are not bound by the rules of the common law in England imply a covenant to pay at the stipulated rate even beyond the time fixed?

[Much of the learning as to interest *post diem* has become antiquated by the decision of the Privy Council in *Mathura*

1. (1869) L. R. 8 Eq. 331.
2. 5 Ir. Ch. Rep. 104.
3. (1875) L. R. 14 Eq. 291.
4. (1883) 24 Ch. D. 289.
5. (1880) 14 Ch D. 49.
6. (1853) 22 L. J. Ex. 232.
7. (1847) 16 L.J. Ex 87.
8. (1874) L. R. 7 H.L. 27.

Das v. *Raja Narindar*[1] which laid down that ordinarily it must be taken to be the intention of the parties to a mortgage that interest at the contract rate should be charged up to the date of payment and not up to the due date only and that regard should be had to this intention in construing instruments in which there was no express stipulation for payment of interest after the date in which the principal was covenanted to be paid. See also *Bindesri Naik* v. *Ganga Saran Sahu*[2].—Ed.]

However this may be, the next question is of greater importance. The Allahabad Judges maintain that in respect of this interest *post diem* which sounds in damages, the mortgagee is not entitled to a charge on the property mortgaged, and that he is barred in respect of them, if he sues more than six years from the due date. There are two Indian cases which have proceeded on a contrary view of the law, though the question does not appear to have been raised in them—*Deen Doyal Lall* v. *Het Narain Singh*[3] and *Bishen Dayal* v. *Udit Narain.*[4] There the learned judges awarded a lower rate of interest, it is true, than what was stipulated, but they allowed it although more than six years had elapsed and declared it a charge upon the property. It seems to be pretty clear in England, that interest *post diem*, whether it is technically called damages or interest, is recoverable from the property on which the principal is charged. In *Mellersh* v. *Brown*[5] which was an action for foreclosure of a mortgage of reversionary interests in personal estate, *Kay* J. held that redemption could be allowed only on payment of interest for the whole period of *fourteen years, which had elapsed since the due date, although there was no provision in the deed for the payment of interest *post diem*. In this case the amount of that *post diem* interest, whether it was damages strictly or not, was treated as a charge upon the mortgaged estate. So also in *Wallington* v. *Cook*,[6] in taking accounts in a mortgagee's action the mortgagee was allowed *interest* after the fixed day at the rate of 5 per cent. per annum as against the property mortgaged. [* 585]

1. (1896) L.R. 23 I. A. 138: I.L.R. 19 A. 39.
2. (1897) I.L.R. 20 A. 171; L. R. 26 I. A. 9.
3. (1876) I.L.R. 2 C. 41.
4. (1886) I.L.R. 8 A. 486.
5. (1890) 45 Ch. D. 225.
6. (1878) 47 L.J. Ch. 508.

In Gordillo v. *Weguelin*,[1] *Amphlett* J. A. said at page 303 : "However the bond had been expressed, if the bond had said that the interest was to cease on a particular day, I should say, that this being a mortgage bond, interest would be payable upon it—in the shape of damages it may be technically, but as much *interest* as if it were recovered in any other shape." But the learned judges of the Allahabad High Court say that whatever the law may be in England, the Transfer of Property Act is against allowing interest *post diem* as a charge upon the mortgaged property, and refer to Ss. 67 and 86 of the Act as supporting their view. But is there anything in the Act to counteract the view that interest *post diem* may be interest within the meaning of the words contained in S. 86? We find the words 'interest' and 'damages' employed without distinction in respect of 'interest *post diem*.' In *Caledonian Ry. Co.* v. *Carmichael*,[2] Lord *Westbury* says: "Interest can be demanded only in virtue of a contract express or implied, or by virtue of the principal sum of money being wrongfully withheld and not paid on the day when it ought to have been paid." See also FISHER on *Mortgage*, Ss. 1488 and 1489. The Statute 3 & 4 Wm. IV., Ch., 42, S. 28 enacts 'that upon all debts or sums certain payable at a certain time or otherwise the jury may allow *interest* to the creditor from the time when such debts or sums certain were payable." See also Act XXXII of 1839. Here the word includes interest *post diem* which sounds in damages. We may also refer to the statutory mortgage under 44 & 45 Vict., Ch. 41, called the Conveyancing and Law of Property Act, 1881, S. 26 of which enacts a statutory implication of an agreement to pay interest until realization of the amount, as an indication of the principle that interest though beyond the due date should be payable to the mortgagee out of the mortgaged property. It appears to us that there are indications in the Transfer of Property Act to show that *post diem* interest is as much a charge on the property as the stipulated amount. S. 69, which treats of a power of sale and the mode of its exercise, authorizes the mortgagee after payment of all charges and expenses incident to the sale to apply the remainder, if any, in discharge of the mortgage-money and costs and other moneys due under the mort-

1. (1877) 5 Ch. D. 287 (303) 2. (1870) L.R. 2 H. L. (Sc.) 56.

age. This would* appear to include damages for non-payment at the due date. S. 83 relating to the deposit in court by a mortgagor speaks of the money due on the mortgage and S. 84 says that interest shall cease after tender of the amount remaining due on the mortgage, and S. 97 which relates to sale of property subject to a prior mortgage, directs the money realized to be applied in payment of whatever is due *on account of the* prior mortgage, if the sale has been made free of it. We venture to think that all this indicates an intention to make interest *post diem*, by whatever name it may be called, as much a charge of the property as the interest stipulated. As to the objection of the learned judges, that the charge in respect of damages cannot be determined as commencing from any particular point of time, we cannot see much force in it. If the charges that a mortgagee may incur under S. 72, whether for the management or the preservation of the property, or for supporting the morgagor's title to the property, or making his own title good against the mortgagor, can be added to the principal money, and the question of the point of time from which such charges are enforceable raises no difficulty, surely it cannot be contended that there is any insuperable objection to considering the damages an encumbrance upon the property like interest. If subsequent mortgagees are to be postponed to all the proper charges of a prior mortgagee, and his costs of a mortgage-suit, there seems to be no great difficulty in accepting the position that mortgagees can only claim, after the damages, which the prior mortgagee is entitled, are paid. [* 586]

We may refer in support of our view to the opinion of Mr. Ghose in his book on Mortgages, p. 480, "that the damages, (*i. e.*, interest *post diem*), ought to be regarded as part of the mortgage-debt, just the same as the interest due to the creditor under the terms of an express agreement." He adds, "I may, however, be permitted to observe that this distinction, *i. e.*, between interest and damages, which may be followed by very serious consequences to the mortgagee could hardly have been present to the mind of the author of this Act, in which we find the word interest used throughout without reference to any such distinction."

[Upon the question whether interest payable as damages is recoverable as a charge on the mortgaged property and is recover-

able beyond the period of 3 years or 6 years if the mortgage is not registered or is registered, opinions are still conflicting. But it may be stated that the Privy Council decree in *Chajmal Das* v. *Baij Bhukan Lal*[1] is sufficient authority for the view that such interest, though payable as damages, is still in the same position as the principal and will follow it, and that therefore, such interest is recoverable out of the mortgaged property as a charge and will be governed by the same period of limitation as the principal. In that Privy Council case their Lordships did not dissent from the view that there was no covenant to pay interest after the term fixed for payment but yet gave interest at the rate mentioned in the bond for 2 years as damages up till date of plaint. Here the mortgage bond was of 1873, the amount was payable in 1875, and although the date of suit does not appear, it is surely beyond 6 years from 1875. Of course the point as to limitation and as to charge was not raised, the respondent not being represented. But the Calcutta High Court holds that interest is not recoverable as damages beyond 6 years under Article 116 if the mortgage is registered. See the judgment of the majority in *Moti Singh* v. *Ramohari Singh*[2] and the same view has been taken in Madras. See *Badi Bibi* v. *Sami Pillai*[3], *Thayar Ammal* v. *Lakshmi Ammal*[4]. But see *Rama Reddi* v. *Appaji Reddi*.[5] All these Madras decisions were before the decision of the Privy Council in *Mathura Dass* v. *Raja Narindar*[6] :—ED.]

[* 611]

* NOTES OF INDIAN CASES.

Bishen Dayal v. The Bank of Upper India, Limited.—I. L. R. 13 A. 290.—The correctness of this decision seems doubtful. An application to execute a decree against a certain person as representative of the judgment-debtor was disallowed on the ground that he was not the representative. There was no attempt to disturb the order by appeal and it became final. The last clause of S. 244, C. P. C., had no application as the question of the representative character was not taken up on appeal. The alleged representative appealed for costs. It is not clear how

1. (1895) I. L. R. 17 A. 511 : L. R. 22 I. A. 199.
2. (1897) I. L. R. 24 C. 699.
3. (1892) I. L. R. 18 M. 257 (261, 262.)
4. (1895) I. L. R. 18 M. 331.
5. (1894) I. L. R. 18 M. 248.
6. (1896) I. L. R. 19 A. 39 : L. R. 23 I. A. 138.

he was entitled to appeal as he was not a party or the representative of a party to the suit. Nor can we understand how Mr. Justice *Mahmood*, derives any support from the decision in *Sethchand Mal* v. *Durga Dei*[1].

Raja Har Narain Singh v. **Chundhrain Bhagwant Kuar.**—I.L.R 13 A. 300; 18 I.A. 55.—An award made after the expiry of the time granted by the court is not valid. As the court has power to extend the time for giving security, after expiry of the time originally fixed (see *Badri Narain* v. *Sheo Koer*[2]) it has also the power to extend the time for making the award even after the time originally fixed. [See *Ram Manohar Misr* v. *Lal Behari Misr*[3]; *Lakshmi Narasimham* v. *Somasundaram*[4]]. But it cannot extend the time after the award is made, nor pass a decree upon the award made after time. [As to the difference between the making of the award and the delivery of the same, see *Asad-ul-Lah* v. *Muhammad Nur*[5] and the cases cited therein:—Ed.]

Bishnath Prasad v. **Jagarnath Prasad,**—I.L.R. 13 A. 305.—On the facts of the case the decision seems to be correct. The distinction drawn by the learned judges that the decision in *Skinner* v. *Orde*[6] related to a pauper suit, while the present case relates to a memorandum of *appeal, does not [* 612 strengthen the conclusion arrived at by them. The reasoning in *Skinner* v. *Orde*[6] seems to be even better applicable to a pauper appeal, for the memo of appeal filed under S. 592, is independent of the pauper petition in appeal, and is in all respects the same as a memo of appeal under S. 541, and the subsequent payment of stamps need not affect the continuance of the memo of appeal as such. While in the case of the pauper suit, the application to be made a pauper being itself the plaint, the refusal of that application must lead to the presentation of a new or modified plaint. We cannot also agree with the learned judges in the distinction they draw between "insufficient stamp" in Cl. (2) of S. 54, and a wholly unstamped paper like the memo. of appeal accompanying a petition to appeal *in forma pauperis*. It seems to be too much of a

1. (1889) I. L. R. 12 A. 313.
2. (1889) I. L. R. 17 C. 512.
3. (1892) I. L. R. 14 A. 343.
4. (1892) I. L. R. 15 M. 384.
5. (1905) I. L. R. 27 A. 459.
6. (1879) I. L. R. 2 A. 241. (P.C.)

refinement. [Delay may be excused under S. 5 :—See *Girwar Lal* v. *Lakshmi Narain*[1]: —ED.]

The Secretary of State for India in Council v. **Bhagwanti Bibi.**—I. L. R. 13 A. 326.—The court held that the Secretary of State is entitled to appeal in respect of the court fee in a pauper suit. Their Lordships relied upon an earlier case —*Janki* v. *The Collector of Allahabad*[2]—where in execution proceedings in respect of the court-fee, a right of appeal was allowed under S. 244, Cl. (*c*). The Madras High Court seems to have assumed the right of appeal in an early case though the question itself was not raised—see *Appayya* v. *The Collector of Vizagapatam*[3]—and in a later case—*Chandrareka* v. *Secretary of State for India*[4]—the appeal was by the defendant against the plaintiff and the Secretary of State who became the sole respondent on the ground that the decree awarding costs was erroneous. [In a later case, however it was distinctly held that no such appeal lay. See *Collector of Trichinopoly* v. *Sivaramakrishna Sastrigal.*[5]] S. 411, of the old Civil Procedure Code, merely says that if the pauper plaintiff succeeds, the court-fee shall be recoverable by the Government in the same manner as costs of suits are recoverable. S. 408 allows the Government to adduce evidence in disproof of the applicant's pauperism. But the Government is not a party to the suit and the whole tenor of Ch. 41 of the Code indicates that a party to the suit or his representative is alone entitled to appeal. Surely it will not be contended that a right of appeal is granted in every case of an order as to costs because S. 220 says that "every order relating to costs made under the Code may be executed as if it were a *decree for money*." The decision of *Melville* and *West* JJ. in *The Collector of Ratnagiri* v. *Janardan Vithal Kamat*[6] [followed in *Collector of Kanara* v. *Rambhat*[7]] that there is no right of appeal as the Government is no party to the suit, appears to us to lay down the correct rule on the matter.

Durga Dai v. **Bhagwat Prasad.**—I. L. R. 13 A. 356 & **Batak Nath** v. **Pitambar Das.**—I. L. R. 13 A. 560.—The

1. (1904) I. L. R. 16 A. 329.
2. (1886) I. L. R. 9 A. 64.
3. (1881) I. L. R. 4 M. 155.
4. (1890) I. L. R. 14 M. 163.
5. (1899) I. L. R. 23 M. 73.
6. (1882) I. L. R. 6 B. 590.
7. (1893) I. L. R. 18 B. 454.

decisions in these two cases are of considerable practical importance. What is the scope of S. 90 of the Transfer of Property Act? When there is a decree for sale upon a mortgage and the proceeds of the mortgaged property sold are insufficient to pay off the decree amount, a decree for the balance may be made under S. 90, recoverable from the other property of the judgment-debtor. This kind of second decree in the same suit was unknown before the Transfer of Property Act. But such a decree is not to be made if the amount is not legally recoverable personally. It will not be legally recoverable if the personal remedy is barred, or if there be no personal covenant to pay. S. 90 will not apply to those cases. But a decree for sale under S. 88, in the case of a mortgage, is possible only if it is a simple mortgage, or there is a contract to the effect that the property may *be sold, *vide* S. 67. If in these cases the plaintiff prays for relief * [613] against the defendant personally, the Allahabad Judges are of opinion that the Court is bound to pass a decree in the first instance, awarding that relief, irrespective of S. 90. The application of that section would, therefore, appear to be limited to cases where the plaintiff being entitled to relief against the defendant personally, in addition to his claim against the property mortgaged, fails to pray for it in the plaint. S. 43, Civil Procedure Code, does not prevent the application under S. 90 of the Transfer of Property Act. [Nor will S. 13 Civil Procedure Code apply where, though the relief for the personal remedy is asked for, the first decree only directs the sale:—See *Musaheb Zanankhan* v. *Inayat-ul-lah* [1] and cf. *Uttam Ishlok Rai* v. *Ram Narain Rai* [2]:—Ed.] The form of the decree for sale under S. 88 is given in No. 128 of the 4th Schedule of the Code of Civil Procedure. The application for a decree under S. 90 may well be a step in aid of execution though we cannot see how it can be treated as an application for execution. [See *Purna Chandra Mandal* v. *Radha Nath Das* where the Calcutta court has held that it cannot be even a step in aid of execution of the decree for sale:—Ed.] The limitation provided by Art. 178 will apply to such an application. [See also *Ram Sarup* v. *Ghaurani*.[4] *In Purna Chandra Mandal* v. *Radha Nath Das*,[3] the Calcutta court held that such applications were

1. (1892) I. L. R. 14 A. 513.
2. (1906) I. L. R. 28 A. 365.
3. (1906) I. L. R. 33 C. 867.
4. (1899) I. L. R. 21 A. 453.

not applications in execution and *Mookerjee* J. observed in the same case that they were applications in the suit and were not governed either by Art. 179 or Art. 178 of the Limitation Act:—ED.]

Fazl Karim *v.* **Maula Baksh.**—I. L. R. 18 C. 448; 18 I. A 59.—We draw attention to this case for the expression of opinion contained in it, at page 475, that after a case had been decided in second appeal by the High Court, it would be competent to the party, against whom the first appellate court's findings on the facts had become final, to obtain leave to appeal to the Privy Council on the facts from the first appellate court's decree. Special leave may, of course, always be granted by the Privy Council. It seems also that the first appellate court whose decree is complained of may (*vide* Ss. 598 and 600) certify that it is a fit case under Cl. (*c*) of S. 595, which speaks of "any decree" which includes judgment or order. But where a Subordinate or District Judge decides an appeal when the value of the subject matter exceeds Rs. 10,000, as it may, *vide Pichayee* v. *Sivagami*[1], is he competent to give leave under S. 596? The answer depends upon the meaning of Cl. (*a*) of S. 595. Is his decree a "final decree passed on appeal by a court of final appellate jurisdiction?" He exercises, no doubt, final appellate jurisdiction in respect of his finding of fact on appeal. But it is not clear that it is a decree by a court of final appellate jurisdiction, as a second appeal lies, though it is confined to questions of law. We are inclined to think that he may not be competent to give leave in the case last mentioned.

Wajihan *alias* **Alijan** *v.* **Bishwanath Pershad**—I.L.R. 18 C. 462 and **Radha Kishen Lall** *v.* **Radha Pershad Sing.**—I. L. R. 18 C. 515.—[See also *Bunko Behary Gangopadhya* v. *Nil Madhub Chuttopadhya*—I.L.R. 18 C. 635].—The decisions in these cases will be welcomed by suitors and the profession. The decision of the Allahabad High Court in *Radha Charan* v. *Man Singh*[2] has caused great hardship and we are glad it has been dissented from. It may be that S. 647, Civil Procedure Code, requires to be worded with greater precision but it does not justify the application of Ss. 43 and 373, Civil Procedure Code, to execution proceedings. [The section

1. (1891) I.L.R. 15 M. 237. 2. (1890) I. L. R. 12 A. 392.

was since amended by adding an explanation. See Act VI of 1892:—ED]. The Bombay High Court has not adopted the view of the Allahabad Judges, vide *Tarachand* v. *Kashinath*[1] and *Shankar Bisto Nadgir* v. *Narsinghrao Ramchandra.*[2] There seems to be no reported decision in Madras on the question. But in *Ramanadan* v. *Periatambi*[3] the court appears to have assumed that S. 373 would not apply to execution proceedings. [See also *Lakshmi Narasimha* v. *Atchanna.*[4] The decision of the Judicial Commitee in *Thakur Prasad v. Fakir-Ullah*[5] has concluded the question by overruling the view taken by the Allahabad decisions. Even before the Privy Council decision a Full Bench of the Allahabad High Court receded from their former view. See *Sadho Saran* v. *Hawal Pande*[6] :— ED.]

Bai Mamubai *v.* Dossy Moraji—I. L. R, 15 B. 443. —The principal questions in this case were the same as in *Javerbai* v. *Kablibai*, I. L. R. 15 B.* 326, [noticed at page 400 *ante*] [614] which was also decided by the same learned Judge, *Farran* J. He also held that a gift to *dharma* (or charity) on failure of issue of the daughter was void for vagueness.

Queen-Empress *v.* Dada Ana.—I. L. R. 15 B. 452.—Whatare the powers of the High Court on a reference under S. 307, Civil Procedure Code? Perhaps the statement of law by the Chief Justice is the correct one, namely, that the High Court should not interfere with the verdict of the jury unless it is clearly and manifestly wrong but that it possesses larger powers of interference with the jury's verdict than the Courts in England in civil actions tried by a jury. See *Queen-Empress* v. *Guruvadu*[7] and cf. *Queen-Empress* v. *Chinna Tevan*[8]. It is a pleasure, however, to read the very able dissenting judgment of Mr. Justice *Jardine.* [See also *Queen-Empress* v. *Madhavrao*[9] and *Queen-Empress* v. *Devji Govindji*[10] :—ED.]

Meer Kaisur Khan Murad Khan *v.* Ebrahim Khan Musa Khan.—I. L. R. 15 B. 532. We are unable to—

1. (1885) I. L. R. 10 Bom. 10 B 62.
2. (1887) I. L. R. 11 B. 467
3. (1883) I. L. R. 6 M. 250.
4. (1891) I. L. R. 15 M. 240.
5. (1894) I. L. R. 17 A. 106
6. (1893) I. L. R. 19 A. 98.
7. (1892) I. L. R. 13 M. 343.
8. (1890) I.L.R. 14 M. 36.
9. (1894) I. L. R. 19 B. 735.
10. (1895) I. L. R. 20 B. 215.

accept the decision in this case as correct. So far as Bombay is concerned the question cannot be reopened. We venture to think that the learned Judges have misunderstood S. 24 of the Stamp Act. The decisions in *Reference from the Board of Revenue*[1], *Reference under Stamp Act, S.* 49[2] and *Reference under Stamp Act S.* 46[3] lay down the right principle. What is conveyed under the certificate of sale is the equity of redemption and stamp duty ought not to be charged on the amount of the encumbrance as well. What is the amount of the consideration expressed in the document? The payment of the encumbrance by the purchaser is not expressed as part of the consideration. We do not see why duty should be paid on that also.

SUMMARY OF ENGLISH CASES.

Whitwood Chemical Company *v.* Hardman.

[1891] II Ch. 416.

Contract of employment—Service as manager—Whole time—No negative covenant—Injunction.

The manager of a manufacturing company contracted to "give the whole of his time to the company's business," but the contract did not contain any express negative covenant. The plaintiff sought to restrain the manager from engaging in any other business, the manager having expressed his intention to become a shareholder and director in a new rival company. *Held* by the Court of Appeal, reversing the decision of *Kekewich* J., that the manager's contract of service not being specifically enforceable, the plaintiffs were not entitled to an injunction, restraining him from giving any of his time to any other purpose.

The decision in *Lumley* v. *Wagner*[4] is an anomaly, which it would be dangerous to extend. *Montague* v. *Flockton*[5] disapproved.

Per Lindley L. J.—Because a person has agreed to do a particular thing, it does not follow that he is therefore to be restrained from doing everything else, which is inconsistent with it. [See the cases discussed in *Ehrman* v. *Bartholomew*[6]; and *Subba Naidu* v. *Haji Badsha Sahib*[7]:—ED.]

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1. (1883) I. L. R. 10 C. 92.
2. (1882) I. L. R. 5 M. 18.
3. (1884) I. L.R. 7 M. 421.
4. (1852) I. D. M. & G. 604; 42 E. R. 687.
5. (1873) L. R. 16 Eq. 189.
6. (1898) I Ch. 671.
7. (1902) I.L.R. 28 M. 168.

*** Angus *v.* Clifford,** [1891] II Ch. 479. * [615]

Action for deceit—Statement bonafide beleived to be true—Grounds of belief—Stupidity or gross negligence.

Held, following *Peek* v. *Derry*,[1] that when a person making a statement *bona fide* believes it to be true, he is not liable on an action for deceit, although the belief may be due to stupidity or gross negligence, and the statement is made without appreciating the importance of words used. But it is essential that there must be *belief* in the truth of the statement. If it is made owing to indifference whether it is true or false, an action for deceit will lie. But when the belief exists, the fact that the words employed are calculated to convey to the hearer a meaning quite distinct from that intended, is immaterial unless the speaker is conscious that such would be the case. Recklessness does not mean merely carelessness in making the statement but indifference to its truth or falsehood.

In re **Lacon. Lacon *v.* Lacon.** [1891] II Ch. 482.

Will—Double portions relating to—Presumption, rebuttable partnership—Three sons given equal shares—One son already manager on salary subsequent to will—Salary stopped and share given—Son entitled to equal share also along with the others.

Under a will, the three sons of the testator were equally entitled to his share in a partnership ; subsequent to the making of the will, the testator admitted one of his sons E, who had been a manager in the partnership business and pressed for an increase of his pay as manager to $\frac{2}{24}$ out of his $\frac{21}{24}$ share in the partnership, and his salary was discontinued after his admission into the partnership. The testator died without making any alteration in the will. E claimed to be entitled to the $\frac{2}{21}$ share as purchaser and to an equal share with the sons in the remainder of the deceased's rights in the partnership under the will.

Held (reversing the decision of *Romer* J.) that assuming the share was given to E, as a portion, the presumption against double portions was rebutted by the circumstances of the case, which showed that the testator intended E to have a greater share in the business than the other sons.

Per Lindley, L. J:—The $\frac{2}{21}$ share must be held to be a portion.

Per Bowen and *Kay*, L. JJ. :—The gift of the $\frac{2}{21}$ share was probably intended in part at least as a remuneration for E's services as manager.

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1. (1889) 14 A. C. 337.

In re **National Debenture and Assets Corporation.** [1891] II Ch. 505.

Company—Winding up—Certificate of incorporation—Not conclusive to shew seven persons signed.

In a petition for the winding up of a company, the certificate of incorporation is not conclusive evidence of the fact that seven persons signed the memorandum of association.

Mander *v.* **Faleke.** [1891] II Ch. 554.

Landlord and tenant—Restrictive covenant—Father and son—Father no interest in lease—No assignee or purchaser—Occupier of leased house and manager of business—Injunction against father.

In an interlocutory application by a landlord to restrain the defendants from acting contrary to a restrictive covenant, one of the defendants contended that no injunction could be granted against him, as he had no interest in the property, all the rights in which he alleged belonged to his son, the other defendant. *Held* that, it being proved that, although the father was neither an assignee nor a purchaser, he was occupying the house and managing the business and had a pecuniary interest in it, an injunction could be granted against him.

In re **Robson : Robson** *v.* **Hamilton.** [1891] II Ch. 559.

Will—Bequest of desk with contents—Goods, chattels, choses in action and negotiable instruments pass under description.

Held that a bequest of a desk with the contents thereof included not only the goods and chattels in the desk but also
* [616] choses in action kept in it, including those* which were negotiable only after indorsement by the executors, especially as it appeared that the testator himself kept them in the desk. But the fact that a key of a box was one of the articles in the desk did not give a right to the box itself.

In re **Cunningham and Frayling.** [1891] II Ch. 567.

Trust-deed—Acting trustees, meaning of—Power of appointment in acting trustees—Exercising power, itself constitutes 'acting'—Bare trust—Trustee no beneficial interest—Trust involving exercise of active duties, no bare trust.

By the provisions of a deed, the trustees (who were two in number) "or their assigns, or the survivor of them, or the heirs and assigns of such survivor, or other the trustees or trustee of

the time being," were directed to sell certain properties, and if any of the trustees appointed by the deed should die, it was lawful for the acting trustees or trustee for the time being, or the executors or administrators of the last acting trustee, to appoint new trustees. The surviving trustee died intestate, as also did his heir and the heir of the heir. The last left three daughters, who never received the rents and profits of the properties but executed a deed appointing certain new trustees. *Held* by *Stirling* J. that the appointors' not having received the rents was not inconsistent with their being acting trustees, and that having acted when called upon to do so, by appointing new trustees, they were 'acting trustees' within the meaning of the deed. *Held* also that the legal estate was vested in them. A trust which involves the exercise of active duties is not a *bare trust*, although the trustee may have no beneficial interest in the property.

Jones *v.* Merionethshire Permanent Benefit Building Society. [1891] II Ch. 587.

Secretary of Society—Threat of prosecution for embezzlement—Plaintiff's promise to pay debt due by Secretary—Expressed consideration—Forbearance to sue—Promise not to prosecute—Implied term—Illegal.

Plaintiffs undertook to make good the greater part of the debt due to a society by its Secretary, who was threatened with a prosecution for embezzlement. The consideration expressed was the forbearance of the society to sue the Secretary for the amount. *Held* by *Williams* J. that it being in fact an implied term of the agreement that there should be no prosecution, the agreement was illegal and should be cancelled; when the person promising to pay the debt is not the debtor himself but a third person, and the debtor is threatened with a prosecution, and the creditor is aware that the promise to pay would not be made but for the threat, the proper inference is that the real consideration is a promise not to prosecute.

Burchard *v.* Macfarlane : *Ex-parte* Tindall. [1891] II Q. B. 241.

Discovery—No order against strangers to action.

There is no jurisdiction to make an order amounting to one for discovery against persons not parties to the action. The only process intended to be enforced by 6 & 7 Vic., Ch. 82, S. 5, is the production of documents as ancillary to the examination on witness.

Bishop of Bangor *v.* **Parry.** [1891] II Q. B. 277.

Charity property—18 & 19 *Vic., Ch.* 124, *S.* 29—*Lease for more than* 21 *years—No approval of Charity Commissioners—Void.*

A lease granted by the trustees of charity for more than twenty-one years without the approval of the Charity Commissioners, in contravention of the provisions of S. 29 of 18 & 19 Vic. Ch. 124, is not valid for a term of twenty-one years, but is absolutely void, the section invalidating a lease for any term exceeding twenty-one years.

Vernon *v.* **Watson.** [1891] II Q. B. 288.

Friendly Societies' Act 1875, *S.* 16, *Sub-S.* 9—*Order to repay monies misapplied and imposing penalty—Imprisonment in execution—Suit for recovery of money not maintainable.*

S. 16, Sub-S. 9, of the Friendly Societies' Act 1875, pro-
*[617] vides *inter alia* that a person misapplying the property * of the society shall be liable on summary conviction "to a penalty not exceeding £20 and costs, and to be ordered to repay all monies applied improperly, and in default of such repayment or of the payment of such penalty and costs to be imprisoned for any term not exceeding three months." Under this sub-section a penalty was imposed and an order to repay monies was made against the respondent, and he was imprisoned for default in respect of the penalty and the repayment. *Held* by the Court of Appeal that the order to repay the monies misapplied and the imprisonment, which was execution upon it, were a bar to an action subsequently brought by the society for the recovery of the same monies.

Per Lord Halsbury, L. C.—If the operation of the statute had been confined to criminal proceedings, I should have entertained no doubt that the imprisonment for the criminal offence afforded no answer to the civil claim for the debt. The section prescribes a penalty and there follows what is strictly a civil proceeding, an order to repay the money.

Per Lord Esher, M. R.—The legislature has treated all the things specified in Sub-S. 9 as offences, and the order that the money shall be repaid is part of the sentence. The execution of the order to repay is by imprisonment. I doubt whether a distress warrant could be issued to enforce the order. Sub-S. 9 does not oblige the society to proceed under its provisions. There is nothing to prevent them bringing an action to recover the money misappropriated. The remedy given by the sub-section is an alternative remedy.

Fecitt *v.* Walsh. [1891] II Q. B. 304.

Contract to supply milk containing percentage of cream—Reduction of price in deficiency of cream—Delivery of five cans—Procuring samples from each—Two deficient—Two separate offences—38 and 39 Vic., Ch. 6, S. 3.

The appellant contracted to supply milk containing a certain percentage of cream at a certain price, and there was to be a reduction in price if there was deficiency of cream when tested on each delivery. The respondent acting under S. 3 of 38 & 39 Vic., Ch. 63, procured samples from each of five cans delivered on a certain day, and finding two deficient in cream, laid two separate informations in respect of the two samples. A separate penalty was imposed upon each information. *Held*, that the procuring of each sample was a separate transaction; that the appellant had committed a separate offence as to each can in respect of which an information was laid, and that the separate informations were properly laid and the convictions were right. *Held* further that the provisions in the contract as to deficiency of cream were immaterial for the determination of the question whether the appellant had committed an offence under the Act.

Baumvoll Manufactur von Scheiblr *v.* Gilchreste,

[1891] II. Q. B. 310.

Steamship—Owner registered as managing owner—Charter-party—No demise of ship—Bills of Lading signed by charterer's agents or by Captain—Owner's liability.

The defendant was the owner and was registered as managing owner of a steamship. There was a charter-party which did not operate as a demise of the ship. The plaintiffs shipped certain goods on bills of lading, some signed by the captain and others by the agents of the charterer. *Held*, that the plaintiffs, in the absence of notice to the contrary, were entitled to assume that the persons signing the bills of lading had authority from the owner to sign them on his behalf and that the owner was consequently responsible for the •safe carriage of the goods • [618]
which had been lost at sea by perils not excepted by the bills of lading, and that the owner was liable as well in respect of the goods specified in the bills of lading signed by the charterer's agents as in respect of those specified in the bills of lading signed by the captain.

The Queen *v.* Secretary of State for War.

[1891.] II Q. B. 326.

Royal Warrant regulating pay and retiring allowances of officers and soldiers—Secretary of State no legal duty to carry out.

The Secretary of State for War cannot be compelled to carry out the terms of a Royal Warrant regulating the pay and retiring allowances of the officers and soldiers of the army, inasmuch as no legal duty in relation to such officers and soldiers is imposed upon the Secretary of State either by statute or by common law.

Stuart *v.* Bell. [1891] II Q. B. 341.

Master and servant—Police suspicion of theft by servant—Defendant apprised of same and communicated to master—Dismissal of servant—Communication privileged.

The plaintiff was a valet. While he and his master were staying with the defendant, a Magistrate and Mayor of Newcastle, the Police at Newcastle received a letter from the Police at Edinburgh that a theft had occurred while the plaintiff was staying there and the plaintiff was suspected and that cautious enquiries might be made. This letter was shewn to the defendant just before the plaintiff and his master left Newcastle. The defendant, without making any enquiry, communicated the suspicion to the plaintiff's master, in consequence of which the plaintiff was dismissed from service. In an action for slander—*Held* by *Lindley* and *Key* L. J J. (*Lopes* L. J. dissenting) that the occasion of the communication was privileged and that the defendant was not liable in the absence of evidence of malice.

In the goods of Jupp. [1891] P. 300.

Will—Devise—Residuary legacy to wife—Words of devise.

A testator bequeathed to his wife "all my furniture, jewellery, pictures, wearing apparel and all other effects, belonging to me at the time of my decease." The will went on to make specific bequests to his wife of money shares, securities, &c., and it directed her to pay his debts and it was left to her discretion whether she would provide for her sons and daughters. It contained no bequests to any other person. *Held*, that the words "all other effects" constituted his wife residuary legatee.

JOTTINGS AND CUTTINGS.

***A dismissed solicitor restored.*—Readers of the *Law Journal* reports for the month of August will observe a case in which a solicitor on his third application was restored to the roll of solicitors from which he was struck off in 1879 at the instance of the Incorporated Law Society, after being convicted of obtaining £6 14*s*. 4*d*. by false pretences, and being sentenced to six months' imprisonment with hard labour. It is only fair to observe that the conviction was obtained under peculiar circumstances, and that the facts of the case do not appear to have been brought to the attention of the Court on the two former applications for restoration, which were opposed by the Law Society. The present application was strongly supported by evidence of subsequent good conduct, and was opposed by the Law Society. The case is of importance as a distinct authority that the Court has power to restore a solicitor to the roll even after a conviction.—*The Law Journal.* * [587]

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The Lord Chief Justice.—In reply to the Mayor of Birmingham the Lord Chief Justice said:—Right Worshipful Sir, Gentlemen of the Corporation and Magistrates of Birmingham, —I did not come here prepared to receive this address, and, therefore, anything that I say is the issue of the moment. But on the part of my learned brother and myself, I cannot help both gratefully receiving and cordially returning the welcome you have been pleased to give us. I will say that I trust that the justice which is administered in these Courts will be worthy of the shrine which you have chosen to erect for its administration; and this, at least, I may say, that it would be want of power, and not want of will, that would prevent us from fulfilling the expectation you have a right to form from the long and noble and unbroken traditions of that English bench, to which it is the honor of both of us now to belong. (Cheers).

In subsequently addressing the grand jury, his lordship remarked that he was very glad to meet so many county gentlemen present, for, although the Courts, as the Mayor had said, had been the creation of the city of Birmingham, yet business from the county had to be transacted there. The calendar which would be presented was neither large with regard to the number of its items nor grave in the character of the crime of which it was composed. Considering that they were dealing with an enormous

town and a neighbourhood in many parts most densely populated, a calendar containing the names of twenty-seven persons and few serious cases was not an unusual one. After briefly referring to one of the worst cases on the calendar—a charge of wilful murder—he said few people had opportunities of realising as he did the terrible effects produced by intemperance. Of course, there were cases which stood quite aside from the influence of the public-house—crimes such as perjury, forgery, false pretences and others which required the assistance of education; but drunkenness was mainly the cause of the commoner sorts of crime; and if England could be made sober, three-fourths of her gaols could be closed. He trusted all in positions of authority would do what they could to set their faces against this great evil. *Another crime*
[588] ** that appeared to be on the increase was perjury.* The crime of perjury was one of such enormity and wickedness that the code of punishment was not sufficiently severe, especially considering the cruel results which might follow. Perjury corrupted justice at the fountain-head, and turned the court into a field of triumph for successful fraud. It was impossible to say anything too strong in denunciation of perjury; but it must be remembered that *unsucessfull prosecutions for perjury caused mischief, because the failure of the prosecution suggested to people likely to give way to perjury that, after all, there was not very much danger.* Therefore, it was to be hoped in such cases the grand jury would not return true bills unless they were tolerably certain of a conviction.

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Veracity of English witnesses.—In dealing with an appeal from Chambers Mr. Justice *Williams* stated that the result of his experience at the bar and upon the bench was that English witnesses who are not parties to the proceedings usually speak the truth, but that the litigants themselves do not, but generally swear to whatever they think will suit their case. He added that, in his opinion, the best remedy for this growing practice on the part of suitors was the infliction of very severe punishment whenever prejury was detected.

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Sir Charles Russel's brief for Captain Warner, the co-respondent in the Lyon divorce case, was, says the *Star*, marked 100 guineas. But this was not all. There was also a 'special' fee of 50 guineas, and a 50 guinea refresher for the 2nd day of trial —200 guineas in all. This, of course, would have been ridiculously inadequate remuneratian for *Sir Charles's* services if

they had been given. The great counsel's fee was so small because he had nothing in particular to do for the money. On Saturday when the case came on *Sir Charles* was in another court engaged in a big probate suit. On Monday morning when the divorce case was resumed *Sir Charles* did just look into the court. But he did not stay. Even the big probate suit had to go on for half an hour or so without him, whilst he transferred his services to the Cathcart case. And the Cathcart case did not monopolise his exclusive attention; for he also attended in the Maybrick Insurance case, where he was retained on behalf of the plaintiff. Altogether *Sir Charles Russell* must have had a pretty good day.—*The Law Times.*

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Judicial Incompetency.—It is impossible not to express our most profound surprise that the Common Serjeant of the city should invite criticism upon his qualifications for the position of recorder. Inability to appreciate one's own unfitness for judicial office is perhaps the worst mental weakness with which any member of the legal profession can be afflicted. But that this inability should continue after years of experience, which have completely satisfied the public and the profession upon the point, leads to the conclusion, that nothing which falls from the aspirant should weigh for a moment with those who have to appoint. Tradition! Merciful Heavens! Can tradition save the liberty and fortunes of the multitudes whose fates hang suspended before *the judgment-seat at the Old Bailey? Can tradition grip firm [589]
hold of the scales of justice and infuse judicial acumen and legal knowledge when these elements are wanting? If the bar which practises before the Common Serjeant will record a single vote in favour of his promotion, we will pause to consider whether we can revise the opinion which we conceive the public interest compels us to express.

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A Retiring Counsel.—Mr. *Napier Higgins*, Q.C., on the last day of appearing as leading counsel before Mr. Justice *Romer*, set an admirable example of how to retire with dignity. To some kind and complimentary expressions of the judge, Mr. *Higgins* said 'I am much obliged to your lordship.' Let us imagine what it might have been. 'My Lord—Forty years ago I came to the bar and started in the keen competition of the profession in a room on the third floor in old square, with a body, who I am proud to say, is still my clerk. That clerk has been a

most invaluable servant, one of that great and honourable body of men known as law clerks, who contribute so largely to the successful administration of justice, and the comforts and emoluments of their masters. Proceeding onwards, encouraged by many kind friendships and unassisted by any merit of my own, I at length attained to the satisfactory and dignified position of leader in one of the great historic tribunals of this country, sitting in this magnificent pile, where law and equity walk hand in hand. I cannot look back upon the many years during which I have practised in Chancery without alluding to some of the great persons whom I have intimately known. [Here follow biagrophical sketches of all the eminent equity lawyers of the past two generations]. Nor, my Lord, can I forbear from saying with what genuine satisfaction I have watched your Lordship's career. [Here follows a detailed reference to the career of tha Judge.] And taking a last look round I see so many familiar faces—faces of friends whose rivalry I have valued, and whose esteem, I have done my best to deserve. [A painful pause of some moments]. 'My Lord, farewell, may you occupy your high position for many years to come, adorning the seat you fill, and contributing to consolidate the foundations of that splendid jurisprudence which that of no other country can aspire to equal, much less surpass.' [Mingled emotions and varied sounds in court]. Compare all this with the dignified silence of the successful and fortunate man retiring from a laboiious life. "I am much obliged to your Lordship."—*The Law Times.*

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Singular Action against an M. P.—An extraordinary case was heard by Judge *Bayley* in the Westminister County court on August 13, in which the plaintiff, a Mr. Travers, of 6 Sidmouth Street, St. Pancras, which is within the Parliamentary division of South St. Pancras, sued Sir Julian Goldsmid, M. P., for damages for refusing to present a petition to the House of Commons. Sir Julian Goldsmid was represented by his private secretary. The plaintiff, in opening his case, said he had searched, but without success, to find a case like the present, which, he submitted, was a novel one. He then referred to Lord Farnborough's book upon House of Commons Practice and Smith's
* [590] Leading Cases. He had a grievance, and the only way * he could bring the matter forward was by petition to the House of Commons, and on June 19 he sent a petition to Sir Julian Goldsmid, which was returned to him by one of the clerks of the House,

stating that, as the petition reflected upon the character of a judge, it could not be received. He submitted that Sir Julian Goldsmid should have followed the matter up and not been put off by a clerk like that. A few days after that, he sent Sir Julian Goldsmid another petition, which he returned and refused to present The law did not allow any action against a judge, and the only remedy was that which Parliament could take. The second petition had the last paragraph struck out.—His Honour: 'It is equally objectionable.'—The plaintiff: 'It is the duty of a member of Parliament to bring the matter forward if a petition fails' Continuing, he said he brought an action against Lord Esher for slander in the course of a case, and that was ordered to be struck out, as no judge could be sued. How could he question the conduct of a judge when the only course open to him was by petitioning Parliament, and that course was denied him on the ground that he was assailing the conduct of the judge? After some further discussion, judgment was given for the defendant.

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American Law Clerks:—The several thousand law clerks who now toil in the city offices, says a New York Journal, are quite a different set of beings from their predecessors. The majority of them are well educated. Some have graduated from well-known colleges—from Harvard, Yale, Cornell, and Princetown. Others are graduates of law school. Never was there a time like the present, when so many college-bred men were glad of the opportunity to become law clerks at a beggarly salary. Every year lawyers of standing in our cities have applications from college graduates, ready and willing to work without pay, if they will only give them desk-room and the use of their books. Consider for a moment the pay of these ambitious young men. The college-bred law clerk usually begins at five dollars per week. He may reasonably expect to earn ten dollars per week by the end of the second year. The graduate of a law school having had some technical training, is better paid. He gets ten dollars per week for the first year of his service, and perhaps he may begin his second year at fifteen dollars per week. Very few lawyers in New York pay their clerks over fifteen dollars a week as they can hire all the talent they want at that figure. *There are between six thousand and seven thousand lawyers in the city of New York*. The struggle for practice and existence become more difficult each year. Many are called, but few are chosen.

Some men never get beyond being a law clerk. It is a not uncommon thing to find skilful lawyers, grey-haired men, serving as clerks year after year at a salary of from 1,200 dollars to 1,500 dollars per annum. Some of them are experts in a particular branch of the law. Again, there are men fit only to be law clerks—men who, for one reason or another, fail to become successful practitioners. The legal knowledge of such men is of more value to others than it is to themselves. Once more, they are highly educated law clerks who make it a business to write briefs. Indeed, *it is an open secret that nearly one half of the law books published are written by ill-paid clerks.* The lawyer with a reputation gets some clerk to write a treatise to which he lends the weight of his name.—*Montreal Legal News.*

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[619] BANK OF ENGLAND *v.* VAGLIANO BROTHERS.

(1891 A. C., 107: 23 Q. B. D., 243: 22 Q. B. D., 103.)

We propose to examine the decision in this case, which is one of great importance to the commercial community, and which raises questions which are of great interest to all lawyers. The facts of the case are briefly these: Plaintiff, who carried on business in London as a merchant and foreign banker under the name of Vagliano Brothers, claimed that it might be declared that he was entitled to be credited by the defendants, the Bank of England, with the amount of £71,500 alleged by him to have been wrongfully and without his authority debited to his account under the following circumstances. Among the clerks employed by the plaintiff was one of the name of Glyka. He and another clerk managed the foreign correspondence of the firm. Between February and August 1887, by a series of elaborate and ingenious frauds, he obtained the plaintiff's acceptance to forty-three bills, of which he received payment from the defendants to the amount of £71,500. The way in which the fraud was effected was this: The plaintiff had in various parts of the world a large number of correspondents, who were in the habit of drawing bills on him from time to time, which on representation by the payee or his agent would be accepted by the plaintiff and returned to him. The plaintiff would give intimation of the acceptance to the Bank of England and request them to pay at maturity and debit to his account, and this would accordingly be done by them. Among the correspondents was one Vucina, who resided in Russia and who had unlimited credit with the plaintiff. One of the firms, to

whose order Vucina used to draw, was Petridi & Co., a firm carrying on business at Constantinople. Glyka, from his position in the plaintiff's office, had no difficulty in possessing himself of specimens* of Vucina's genuine letters of advice and of his [* 620] genuine bills. Having done so he had paper prepared identical in texture and general appearance with that on which Vucina's business letters were written, and he also had bills prepared identical in all respects with Vucina's genuine bills. To these he forged Vucina's name as drawer with extraordinary skill and wrote on the face of the bill the name of Petridi & Co., as payees, and stamped on the face of the bills the name of Pasque & Son as indicating the name of the London firm, who had left the bill for acceptance. He forged letters of advice from Vucina with reference to the bills and placed them with the ordinary correspondence of the firm, and they were passed on in due course to the clerks, whose duty it was to enter them in the appropriate books. After permitting a sufficient time to elapse, Glyka dropped in the bill box, with the other bills sent by the payees for acceptance, these forged bills, and they were accepted by the plaintiff, and left to be delivered to Pasque, agent of the payees. From the place where these bills were left Glyka had no difficulty in taking them. He then forged the endorsement of Petridi & Co., the payees, adding what professed to be their stamp 'C. Petridi & Co., Constantinople.' The endorsement was to non-existing persons, the name being invented by Glyka. In every case the person, in whose name the endorsement was made, was named on the back of the bill as the person who received the money from the bank. These forged bills were cashed at the bank across the counter on some occasions by Glyka himself and upon others by some one employed by him. The bank people never made any enquiry as to who the person named in the endorsement was. The plaintiff's suit raised the question as to who should bear the loss resulting from such payments. On behalf of the defendants it was contended that they were protected by the Bills of Exchange Act, 1882, S. 7 Sub-S. 3, which enacts that, where the payee of a Bill of Exchange is a fictitious or non-existent person, the bill may be treated as payable to bearer, and contended further that there was such negligence on the part of the plaintiffs as was in law

the direct cause of the loss of the money. Issue was taken on these points. The Judge (*Charles* J.) held that as Petridi & Co., the payees, were real and existing persons, actual [* 621] correspondents of the plaintiffs, who had on previous * occasions been made payees of genuine bills drawn by Vucina on the plaintiff, and consequently were not fictitious to the knowledge of the acceptor, they were not fictitious payees within the meaning of the Act, and that there was nothing to show that there was any intention on the part of the legislature to alter the law as laid down in such cases as *Gibson* v. *Minet*[1] and *Phillips* v. *Im Thurn*[2]. As to who should bear the responsibility of a forged endorsement of an existing named payee, when the acceptor makes the bill payable at a banker's, *Robarts* v. *Tucker*[3] was authority for the proposition that such acceptance is tantamount to an order to the banker to pay the bill to any person, who according to the law merchant can give a valid discharge for it. Consequently, if the payment is made to one who claims through a forged endorsement and so cannot give a valid discharge for the bill, the banker cannot debit it to the acceptor, unless indeed there are circumstances amounting to a direction from the acceptor to the banker to pay the bill without reference to the genuineness of the endorsement, or equivalent to an admission of its genuineness inducing the banker to alter his position so as to preclude the customer from showing it to be forged. The banker can avoid the responsibility of deciding on the genuineness of the endorsements by requiring his customers to domicile their bills at their own offices and to honor them by giving a cheque on the banker. He is also entitled to take time to make reasonable enquiries as to the genuineness of the endorsements. For these reasons the Judge held that the first ground of defence failed. In regard to the second ground of defence that the plaintiff was guilty of such negligence as was the proximate cause of the loss in question, the Judge held, following the decision in *Bank of Ireland* v. *Trustees of Evan's Charities*[4] and *Mayor, &c., of Merchants of the Staple of England* v. *Governor and Company of Bank of England*[5] that no such negligence had been made out. He therefore gave a decree in

1. (1791) I. H. Bl., 569.
2. (1866) L. R. 1 C. P., 463.
3. (1851) 16 Q. B., 560.
4. (1855) 5. H.L. C. 389 : 10 E.R. 950.
5. (1887) 21 Q. B. D., 160.

the plaintiff's favour. An appeal was preferred against this decision, and the majority of the Judges in the Court of Appeal (five against one), held with the lower court that the defendants were not protected by S. 7, Sub-S. 3, of the Bills of Exchange Act, 1882, that Petridi & Co., named as payees in the bills, were not fictitious or non-existing persons within the meaning of the sub-section and that 'fictitious' meant fictitious to the knowledge of the party sought to be charged upon a bill. The *meaning of this is explained by Lord Justice *Bowen* in these words: 'If the drawer is the person against whom the bill 'is to be treated as a bill payable to bearer, the term *fictitious* 'may be satisfied if it is fictitious as regards himself, or, in other 'words, fictitious to his knowledge. If the obligations of the 'acceptor are in question, and the acceptor is the person against 'whom the bill is to be so treated, *fictitious* must mean fictitious 'as regards the acceptor and to his knowledge.' The dissenting judge *Lord Esher* (Master of the Rolls) was of opinion that the payee named in the bills was a fictitious person within the meaning of the Act. He argued as follows: 'Petridi & Co. is 'not the real payee. If he were, he would be entitled to have 'possession of the bill and entitled to endorse it. He is the 'pretended payee. He, who in fact drew the bill, has pretend- 'ed on the face of the bill that Petridi & Co. is the payee; 'but he intended that Petridi & Co. should not be the 'payee. He feigned that Petridi & Co. was the payee when he 'was not. To 'feign' is an equivalent for to pretend. Then 'using the adjective as applicable to the thing feigned, the 'payee, in this case, is a fictitious payee. * * * Moreover, if '*fictitious* in the sub-section does not apply to the name of an 'existing person who is not really intended to be the payee, I can 'see no distinction between *fictitious* and *non-existing* in the 'sub-section.' He therefore held that the bank was protected by the statute for the payment it had made, though but for the statute it could not have set the payments made by it against the acceptor its customer. He and the other judges were, however, agreed that the plaintiff had not been guilty of negligence immediately connected with the transactions so as to disentitle him to recover. The case was taken on appeal to the House of Lords. There again opinion was divided; the majority of the [* 622]

House held that the payee was a fictitious or non-existing person within the meaning of the Act; that the bills could therefore be treated as payable to bearer, and the Bank was therefore protected in making the payments. Some of their Lordships held that the defendants were misled by the conduct of the plaintiff, and the plaintiff was therefore estopped from denying that the payments were properly made. Lords *Bramwell* and *Field* dissented from these views and were of opinion that the payee was not a fictitious or non-existing person within the meaning of the Act, and that there was not such negligence on the plaintiff's part as precluded them from succeeding in the case. In a case like this [* 623] where* there is such strong difference of opinion among eminent judges—*Charles* J., *Cotton*, *Lindley*, *Bowen*, *Fry*, *Lopes*, L.JJ. —Lords *Bramwell* and *Field* taking one view and Lord *Esher*, M. R., the Lord Chancellor, Lord *Selbourne*, *Watson*, *Herschell*, and *Mancnaughten*, taking directly the opposite view—nobody can venture for a moment to say that the points which arose for decision are free from difficulty, but after carefully examining them by the light of the elaborate judgments written in support of the views taken by each set of judges, we feel constrained to say that the conclusion arrived at both by the Court of 1st Instance and the majority of the judges in the Court of Appeal seems to us on the whole to be correct, though some of the reasons assigned by them for it may not be quite sound. There is no doubt that the construction put upon S. 7, Sub-S. 3, of the Bills of Exchange Act, 1882, as to the meaning of the words 'fictitious or non-existing' by *Charles* J. and the Court of Appeal is too narrow and that they were a great deal too much influenced by the current of decisions previous to the date of the enactment in question. The effect of those decisions is well summed up in STORY on *Bills of Exchange*: 'A bill made payable to a fictitious 'person or his order and endorsed in the name of such fictitious 'payee in favour of a *bona fide* holder without notice of the fiction 'will be deemed payable to the bearer and may be declared on 'as such against all the parties who knew the fictitious character 'of the transaction.'— S. 56. 'If the bill is payable to a fictitious person or order (as has been sometimes, although rarely, 'done) then as against all the persons who are parties thereto 'and aware of the fiction (as for example, against the drawer,

'endorser and acceptor) it will be deemed a bill payable to the 'bearer in favour of a *bona fide* holder without notice of the 'fiction.'—S. 200. The result of this state of the law was, as pointed out by *Lord Herschell*, (p. 148), that a holder in due course was sometimes made to suffer wrong. To quote his words: 'What then is the position of a lawful holder of a bill 'so drawn? I do not understand it to be doubted that even 'before the Bills of Exchange Act such a holder could enforce 'payment of the bill against the drawer, for he not merely knew 'that the payee designated was a fictitious person but was him-'self the author of the fiction. As against the drawer then, such 'a bill could be treated as payable to bearer. But if it cannot 'be so * treated as against the acceptor, the holder, who, it may be, [* 624] 'brought or discounted it on the faith of the acceptance, relying 'on the credit of the acceptor, and unwilling to trust to that of 'the drawer alone, is deprived of that upon which he relied, of 'the liability which he regarded as his security for payment. 'The holder in such a case suffers a wrong.' Where the words of the statute are wide enough to cover such cases and to prevent the occurrence of such wrongs and such an interpretation does not inflict any wrong on acceptors who have always their remedy against the drawers, it appears to us to be absurd that a different interpretation should be put on the words, simply because the law previous to the date of the enactment was otherwise. If then a holder for value can treat such a bill as payable to bearer, a banker, who, after acceptance *bona fide*, makes payment of such a bill, can also, we think with *Lord Herschell*, (p. 154), claim that the bill should be treated as payable to bearer, which would protect him for the payment made by him. The next question is whether the person named as payee in the bills of exchange in question is fictitious or non-existing within the meaning of the Act. We agree with *Lord Herschell* (p. 150) in thinking that these words should not be limited to those cases alone when the person so named is a pure creature of the imagination. Such a limitation of the meaning would leave the case he puts undealt with by the Act, that is, where the payee is not fictitious in this sense but the name is inserted as a mere pretence and without any intention that payment should be made to the person designated. That in such cases under the law as it stood before the Bills of Exchange Act the payee would be considered

as fictitious, is apparent from *Cooper* v. *Meyer*.[1] We think that the words of the Act are wide enough to include such cases. Putting then the widest meaning on the words of the statute, we would still ask whether in the present case the payee named in the bills of exchange is fictitious or non-existent within the meaning of the Act. The answer given by the majority of their Lordships in the House of Lords is that, as the whole thing was a fiction, there being no real bills of exchange and no real drawer or drawee, there cannot be any real payee. The plaintiff would gladly have accepted this view of the facts because he could turn round and say to the defendants 'if it is so, you had no right to make any payment on such fictitious
[* 625] *things and charge me with such payments.' He is, however, prevented from doing this by the fact that he has accepted these false bills of exchange, which act estops him from denying as against the defendants that it was a real bill of exchange drawn by Vucina in favour of Petridi & Co. If we have understood the doctrine of estoppel in such cases rightly, it amounts to this. The defendants, who have been misled by the act of the plaintiff to their prejudice, are entitled to say 'though the whole thing is a fiction we shall proceed on the basis that it is a fact—that the bills of exchange are real bills drawn by the real Vucina on you and accepted by you as such.' They are perfectly entitled to do this, but can they in the same breath say 'though, so far as your liability is concerned, we object to your showing that these are not real bills of exchange drawn by the real Vucina who is your correspondent, but we will force you to treat the bills as real bills drawn by the real Vucina, yet so far as our liability is concerned we are perfectly entitled to show that the bills are but fictitious and the drawer Vucina also a fictitious name'? This would be blowing hot and cold in the same breath. They can only ask the court to deal with the case either on the basis that the whole thing is a fiction or that it is a fact. They cannot ask that it be dealt with as a fiction so far as they are concerned and as a fact so far as the plaintiff is concerned. If then the defendants ask the court to deal with the bills as real bills drawn by the real Vucina, how do they make out that the payees, Petridi & Co., are fictitious or non-existent persons? No proof was given that the real Vucina, though he sometimes drew bills payable to

1. (1830) 10 B & C., 468.

the real Petridi & Co., at Constantinople, yet sometimes drew bills on a fictitious or non-existent person called Petridi & Co. at Constantinople. Nor was any evidence given that the Bank, when they made the payments, ascertained after enquiry that the payee named in those particular bills was a fictitious person and therefore the holder was entitled to payment. When they made the payments they were under the belief that the payee named in the bills was a real person, and endorsements purporting to be made by the payee were real endorsements. The only way, in which they proved that the payee was a fictitious person, was by showing that the whole thing was merely a swindle and the swindler never intended that the real Petridi & Co. should be the payees. But this is contrary to the basis on which they *asked the court to proceed in order to charge the plaintiff with [*626] the payments made by them. We therefore think that the Bank was not protected by the Act. In regard to the view that the plaintiff's negligence was the proximate cause of the low e cannot see how this contention can stand at all. The letters of advice sent from time to time by the plaintiff to the defendants giving information as to the bills he had accepted, do not place him in a worse position than his acceptance of the forged bills does, and if his acceptance of the bills does not preclude him from showing that the payments were made not to the payee or any person claiming under him but to a person not entitled to such payment, we do not see how the fact, that he intimated his acceptance to the defendants in order to enable them to have necessary money ready, places him in a worse position. The duty of the defendants to make payment only to the person entitled remains the same. *Robarts* v. *Tucker*[1] which was considered by the House of Lords to have been properly decided, is authority for the proposition that, if a customer tells his banker to pay a particular person and the banker pays some one else, the banker shall make good the payment which he has so erroneously made. That is exactly the case here. The direction was to pay to Petridi & Co. but the defendants paid the sums to a person who had forged the name of Petridi & Co., and they *must therefore bear the loss. Great stress is laid by some of their Lordships on the fact that the plaintiff misled the defendants. But did he do anything to mislead them as to

1. (1851) 16 Q. B. 560.

whether the endorsement of the name of the payees Petridi & Co. was genuine or not? It was not shown that he did anything to mislead the defendants in regard to the endorsements, and it was this which was the proximate cause of the payment and not anything which took place previous to the plaintiff's acceptance of the bills. After carefully reading the judgment of their Lordships we do not feel convinced that the plaintiff was guilty of such negligence as disentitled him to succeed.

[*627] *HINDU LAW OF MARRIAGE—GIFT OF BRIDE.

The decision of the Madras High Court in *Venkatacharlu* v. *Rungacharlu*[1] is one of great importance and interest, and it is therefore desirable to subject it to a critical examination with all possible deference to the learned judges who decided it. The suit was brought by the plaintiff to restrain the defendants from giving their daughter in marriage to another person, the daughter having already gone through the ceremony of marriage with the plaintiff in 1884. At the time of the marriage in 1884, the defendant's daughter was an infant of the age of 4 years, and was given in marriage by her mother in the absence, and without the consent or knowledge, of the father. The District Judge declared the marriage to be fraudulent and void, and dismissed the suit. The plaintiff thereupon appealed to the High Court and the question before the learned judges was whether the marriage was invalid for want of the father's consent. The High Court held that the gift by the mother without the father's consent was lawful and that the marriage was valid, and reversing the decision of the District Judge, granted the injunction prayed for.

As Hindu girls are usually married before they arrive at the age of discretion, their want of capacity is supplied by their guardians. The contract for marriage is not ordinarily between the parties themselves who are to be married, but between their guardians. Who are entitled to act as guardians in marriage is specifically laid down in numerous texts* of Hindu Law.

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1. (1891) I. L. R. 14 M. 315.

* "The father, the paternal grandfather, the brother, the *Sakulya*,* and the mother (in succession), if in possession of their faculties, are the givers of the girl, each succeeding person becoming the giver in default of the preceding person......In the absence of givers, the maiden may choose an eligible husband for herself."—*Yajnavalkya*, I, 63 & 64.

*The authorities all agree in assigning the last place to the mother in the order of guardianship. According to them, it is clear that the mother can be a guardian in marriage only on default of the previously named persons. The courts have not, however, always taken this view. The text of *Yajnavalkya* quoted above was considered by the Madras High Court in the case of *Namasevayam Pillay* v. *Annamalai Ummal*[1] where a divided paternal uncle sued to have it declared that he was exclusively entitled to give in marriage the infant daughter of his deceased divided brother, without consulting the wishes of her mother, the widow of his brother. The right to act independently of the mother, which was claimed by the uncle, was negatived by the court. The mother was held entitled to have at least as much voice in the marriage of her daughter as the uncle. But though this case has greatly raised the mother's status in regard to guardianship in marriage, it does not justify the position that during the lifetime of the father, the mother has any right to dispose of the daughter in marriage. The mother cannot be considered the natural or legal guardian of the daughter during the father's lifetime. There cannot be two natural or two legal guardians of different grades at the same time, and as between the father and the mother, the father has [*628]

"Let a maiden be given in marriage by her father himself, or by her brother with the father's authority, or by her paternal grandfather, or by her maternel uncle, or by her agnates or cognates. In default of all these, by the mother, in case she is competent (to act as guardian); if she be wanting in competence, the distant connexions shall give a maiden in marriage. If no such person be in existence, let the maiden have recourse to the king, and let her, with his permission, betake herself to a bridegroom of her own choice, who belongs to her own caste and is a suitable match in point of descent, morality, age, and sacred learning."—*Narada* XII, 20 to 23.

"A father, a paternal grandfather, a brother, a kinsman, maternal grandfather and the mother (are the persons) by whom a girl may be given in marriage. On failure of the preceding one (it devolves upon) the next in order (to give her in marriage) in case he is able. When she has allowed three monthly periods to pass (without being married), let her choose a husband for herself; three monthly periods having passed, she has in every case full power to dispose of herself (as she thinks best)"—*Vishnu*, XXIV, 38 to 40.

"On the father, paternal grandfather, brother, paternal uncle, kinsmen and mother, the next in order shall give on failure of the preceding person, and, in the absence of all, the maiden shall herself choose."—*Vyasa*, II, 6.

1. (1869) 4 M. H. C. R. 339.

undoubtedly the preferential right under the Hindu Law, *vide* MAYNE'S *Hindu Law* S. 189; MACNAUGHTEN'S *Hindu Law*, Vol. I, Ch. VII. The same rule obtains under the English law and the right of the father has been declared to be absolute against the mother, even though the child be an infant at the breast—see *Reg.* v. *De Manneville*,[1] *The Queen* v. *Barnardo*.[2] The father may under certain circumstances forfeit his guardianship, as for instance, if he neglects to exercise his right and allows the daughter to remain for a long time unprovided with a husband—see *The King* v. *Kistnama Naick*.[3] But so long as he has not forfeited his right, no other person has the right to dispose of the daughter in marriage, except with his consent and permission. The gift by the mother during the lifetime of the father, when nothing has happened to divest the latter of his right, is therefore equivalent to no gift at all.

It is by no means easy to know the *ratio* of their Lordships' decision. At one stage of their reasoning they lay down
[* 629] *that the gift of the bride is essential to a binding marriage. They say that the two essentials† of marriage according to the

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1. (1804) 5 East 221. 2. (1891) 1 Q. B. 207.
3. 1 Norton L. C. 1.

† "For the sake of procuring good fortune to (brides), the recitation of benedictory texts and the sacrifice to the Lord of creatures are used at weddings; but the gift (by the father or guardian) is the cause of (the husband's) dominion (over his wife)"—*Manu*, V, 152.

"The nuptial texts are a certain proof of wifehood; but the learned should know that they are complete with the seventh step (of the bride around the sacred fire)."—*Manu*, VIII, 227.

"When a woman and a man are to unite (as wife and husband), the choice must take place first of all. The choice is succeeded by the (ceremony of) joining the bride and bridegroom's hands. Thus the ceremony (of marriage) is two-fold. Of these two parts (of the marriage ceremony), the choice is declared to lose its binding force when a blemish is (subsequently) discovered (in either of the two parties). The *mantra* (prayer) which is recited during the ceremony of joining the bride and bridegroom's hands, is the permanent token of matrimony."—*Narada*, XII, 2, 3.

The unwary reader should here be warned against the error of inferring from *Narada*, XII, 3 and *Manu*, VIII, 227, that because the marriage becomes irrevocable on the seventh step, gift is not essential to marriage. The recitation of the *mantras* and the taking of the seventh step are the last things necessary to complete marriage. But it does not mean that the initial steps may be dispensed with. The law of England insists upon the solemnization of marriages by a clergyman or by a Marriage Registrar as essential to its validity. But the fact that the marriage becomes irrevocable on the solemnization, or that till then there is a *locus penitentiae* to the parties, does not obviate the necessity for a previous valid contract between them.

Hindu Law, are, (1) gift of the girl and (2) the performance of the religious ceremony. The correctness of this position will be apparent from Manu's description† of the various lawful forms of marriage. But later on their Lordships seem to hold that gift is not essential to constitute a valid marriage. We shall now analyze the reasoning which led their Lordships to hold that such gift is not essential to a valid marriage.

The main argument relied on is that marriage is a *samskaram* or sacrament, and not a mere contract, that the marriage rite creates a religious tie, and that a religious tie once created cannot be untied. The proposition that marriage is a *samskaram* is no doubt correct. But exception must be taken to the common * practice of rendering the Sanskrit word into the English word [*630] sacrament. The word sacrament has had a varied history, and is full of associations likely to mislead. The Sanskrit word simply means a purificatory ceremony prescribed by religion. It suggests no idea of obligation or indissolubility. Whether the marriage relationship can be annulled or not would depend, not upon its falling within the denotation of the word *samskara*, but upon express texts. It is then said that a religious tie once created cannot be untied. No authority is adduced for such a broad proposition. But granting it to be true, the question still remains when a religious tie can be said to be created, and whether the marriage rite by itself invariably and necessarily creates it. See *post Parasara Madhaviyam*, p. 642. The learned Judges are themselves obliged to admit that it does not do so in all cases, as where a person abducts a girl by fraud or force and

† "The *gift* of a daughter, after decking her (with costly garments) and honouring (her by presents of jewels), to a man learned in the Veda and of good conduct, whom (the father) himself invites, is called the *Brahma* rite. The *gift* of a daughter, who has been decked with ornaments, to a priest who duly officiates at a sacrifice, during the course of its performance, they call the *Daiva* rite. When (the father) *gives* away his daughter according to the rule, after receiving from the bridegroom, (for the fulfilment of) the sacred law, a cow and a bull or two pairs, that is named the *Arsha* rite: The *gift* of a daughter (by her father), after he has addressed (the couple) with the text 'may both of you perform together your duties' and has shown honour (to the bridegroom), is called in the Smriti the *Prajapatya* rite. When (the bridegroom) *receives* a maiden, after having given as much wealth as he can afford, to the kinsmen and to the bride herself, according to his own will, that is called the *Asura* rite. The voluntary union of a maiden and her lover, one must know (to be) the *Gandharva* rite which springs from desire and has sexual intercourse for its purpose."—*Manu*, III. 27 to 32.

goes through the ceremony of marriage with her—*Anjona Dossee* v. *Proladh Chunder Ghose.*[1] The mere utterance of the sacred texts then does not produce a religious bond. Their efficacy for this purpose depends entirely upon the existence of certain pre-requisites. Difference of *gotra* and *pravara* and the parties being outside the prohibited degrees are, for instance, absolutely indispensable conditions: "Not even the status of wife is created in those who are *sapindas* or belong to the same *gotra* or *pravara*"—*Mitakshara* II, 52. The vague general maxim that a religious tie once formed cannot be untied does not, therefore throw any light upon the question at issue. The question is whether gift of the bride by the proper person is also one of the pre-requisites necessary to make the marriage ceremony efficacious. As we have already pointed out, it is such a pre-requisite according to the texts of Hindu law.

Being unable to hold that gift is altogether unessential, their Lordships lay down that though gift is necessary, it need not be by the person entitled to the legal guardianship of the girl. They formulate two principles as "the groundwork of the marriage ceremony:" (1) a natural or legal guardian acting in the interests of the girl with due regard to her welfare should choose a suitable husband for her, and (2) the choice should be consecrated by the marriage rite and thereby unalterably fixed. [The word 'ceremony' is evidently used here in a loose sense so as to include the choice also and not merely
[* 631] the religious rite.] It would appear from this* passage and from other passages in the judgment that their Lordships hold that at one and the same time there can be several natural or legal guardians of different grades—a position which the writer of this article cannot find any where stated. If the words 'a natural or legal guardian' were replaced by '*the* natural or legal guardian,' the first principle might be more acceptable.

Three propositions are then deduced from these two fundamental principles, *viz.*: (1) where there is a gift by *a* legal guardian and the marriage rite is duly solemnized, the marriage is irrevocable; (2) where the girl is abducted by fraud or force and married, and there is no gift either by a natural or legal guardian, there is a fraud upon the policy of the religious ceremony and

1. (1870) 14 W. R. 132.

there is therefore no valid religious ceremony, and (3) where the mother of the girl acting as her natural guardian, in view to her welfare, and without fraud or force, gives away the girl in marriage and the marriage rite is duly solemnized, the marriage is not to be set aside. The first of these propositions is perfectly correct if we read, *the* legal guardian for *a* legal guardian. With regard to the second, it has to be observed, that the meaning of the expression 'fraud' upon the policy of the religious ceremony is far from clear. We have heard frauds upon powers, and of violations of the policy of statutes, but 'fraud upon the policy of a religious ceremony' is novel. In another part of the judgment, the judges speak of the religious rite being defiled. This again savours of the mystic style of our Rishis. The second proposition enunciated by their Lordships is also unimpeachable, not because there is a fraud upon the policy of the religious ceremony, but because such marriages are not sanctioned by custom, and because a crime cannot, as observed by the learned judges, be recognized as the source of a legal relation. Under the old Hindu law, however, marriages by force or a fraud were recognized and were known by the names of *Rakshasa* and *Paisacha*, though they were strongly denounced even in those times. In commenting upon Manu, V, 152, *Sarvajna-Narayana* observes that even if a woman is married by force, the marriage is valid, and that dominion is acquired by the husband over the wife. Marriages by capture and by fraud must have been pretty common then as in other primitive societies, and the legal recognition accorded to such marriages must have been prompted by a desire to serve the interest of the women who, having been * violated by fraud or force, were not likely to find favour in the matrimonial market. The eight forms of marriage mentioned in the Smritis fall into two classes, one in which the husband obtained a gift of the bride's hand from her guardian or from herself, and the other in which the transfer of the girl was effected without the volition of her guardian or herself. The latter class of marriages has now fallen into desuetude, and in the remaining class, gift has always been regarded as an essential condition. [* 632]

The third proposition governs the present case and refers to he case of the mother acting as the natural guardian in view to

the welfare of the girl and without fraud or force and giving her in marriage. The first difficulty that occurs is how can the mother act as the natural guardian during the lifetime of the father when he has done nothing to justify his supersession? If she cannot, does the remote contingency of her becoming entitled to dispose of the girl in marriage justify her in claiming that right presently? If the mother is so justified, why should not any distant kinsman 14 degrees removed, who is mentioned next before the mother in the order of guardianship in marriage, be equally justified in doing so? If all that is required is, as stated in the alleged fundamental principle, choice by *a* natural or legal guardian, the choice by the distant kinsman should be equally valid with a choice by the mother. Cases may be easily put in which a distant kinsman may thus exercise his choice and give the girl in marriage during the absence of the parents, without abducting the girl or using any fraud or force. Are their Lordships prepared to go the whole length of their fundamental principle and uphold a gift in marriage by a distant kinsman? There seems to be no warrant in the texts for thus making a distinction between the mother and the other possible guardians. Again, assuming that the mother acts as natural guardian, what is the meaning of the qualification, 'without fraud or force'? If the mother is entitled to act at all in the matter, she must be considered to possess a legal right to do so. How can she be guilty of any fraud against herself? And how again can she be said to use any fraud or unlawful force towards her daughter? The qualification, therefore, is difficult to understand with reference to a person legally entitled to dispose of the girl in marriage. Again, what is the meaning of the qualification 'acting in view to the daughter's welfare'?
[* 633] It seems to be a mockery to apply this * phrase to the marriage of a girl of four years. If the father gave the daughter in marriage to a person not because he considered him to be a proper match, but because the latter paid a large sum of money to the father for his own benefit, however morally reprehensible such conduct may be, the marriage is still valid. If the father may effect a valid marriage even when he does not act in view to his daughter's welfare, a mother may equally do so, provided she is legally entitled to effect a marriage. The very deci-

sion of the Madras High Court in S. A. No. 566 of 1889 quoted by the learned judges shows that the limitation they seek to impose is not well-founded, for in that case the mother gave the girl in marriage for a price of Rs. 400 Provided the marriage is contracted by the legal guardian, the law is not curious to inquire whether his discretion has been well or ill exercised. The law contents itself with prescribing those persons as guardians who are most likely, from their relation to the girl and their general capacity, to act beneficially to her interests and does not proceed to determine the validity of the marriage by an *ex post facto* inquiry into the manner in which the guardian has exercised his discretion. The limitations and restrictions with which the learned judges hedge in the mother's right show their own hesitation and unwillingness to admit the mother's right. Their Lordships claim that their view is supported by authority and is sound in principle. Their Lordships say that the gift of the daughter in marriage is the duty and not the right of the father; but it does not follow that the father may be superseded without any cause and the duty performed by any other person. In fact, whether under the Hindu law or under the English law, the right of guardianship is more of the character of a trust than of a mere right or duty. The right or power is given to the guardian solely in the interests of the minor and may, for just cause shown, be taken away. But so long as the guardian has not forfeited his right, the law will not permit a usurpation of the right any more than the law will permit the usurpation of a trust by a stranger. So sacred a trust is the guardianship of an infant, that the law will not permit a parent to make a binding renunciation of his right. (See the recent case of *Barnardo* v. *Mac Hugh* [1] in the House of Lords). It is therefore submitted that the argument that it is the father's *duty* and not his *right* is beside the point.

* We may now briefly notice some other arguments relied on by their Lordships in support of their decision. [* 634]

The first of them is that *Narada* prohibits a second gift of a girl once given in marriage and that the author of the *Smriti Chandrika* forbids a second marriage and that the first marriage

1. (1891) A. C. 388.

is therefore irrevocable. The answer to this is furnished by their Lordships themselves who concede that if a girl is abducted and married, she may be again married. Without entering into the vexed question, whether second marriages are forbidden by the Hindu Law—see *Parasara Madhaviyam**—it may be said that there are no texts in favour of the exception made by their Lordships regarding marriages procured by fraud or force and that as the exception is really based on considerations of justice and expediency, the same considerations may be applied in other cases where necessary.

The next argument is derived from the religious theory that if an adoption or a marriage which is forbidden is consecrated by a Vedic text, a servile state supervenes and that the prior status is lost. This argument is satisfactorily disposed of by the learned judges themselves who mention it only for the purpose of refutation. Their Lordships hold that this religious theory would not be countenanced by the courts and that the courts would regard the original status as subsisting wherever an inefficacious marriage ceremony has been performed and the status of a wife has not been acquired.

It is then argued that the doctrine of *factum valet* is applicable to the present case. This is one of those maxims which are supposed to explain facts while they really explain nothing and which may, without the least inconvenience, be safely abolished. The maxim is usually invoked whenever it is desired to determine whether the omission of a prescribed formality affects the validity of an act. The application of the maxim to a case depends upon the question whether the formality omitted to be observed was mandatory, or directory, essential or unessential. But when this latter question is answered, the whole problem is solved and there is no necessity for the intervention of the maxim. In the present case, for example, either gift is essential to marriage, or it is not. If it is not, the want of gift will not affect the validity of the marriage.
[*635] If it is, then it is equally clear that the absence of gift *will render the marriage void. The maxim furnishes no general rule by which individual cases can be decided but merely expresses the result in any individual case. The maxim deserves neither

* *Post* pp. 641, 652.

the name of doctrine nor the name of principle with which it has been occasionally dignified. It is besides unknown to the old Hindu Law and is mainly the invention of *Jagannatha* adopted on grounds of convenience by English lawyers, (See *Siromani's* Hindu Law, p. 193; Wilson's Works, Vol. V., p. 71). The whole theory proceeds on a mistranslation of the word *Vastu* by Mr. Colebrooke into *fact* instead of *thing.* The common belief in the existence of this maxim in the Hindu Law is the fruitful parent of numerous other misconceptions.

With regard to the applicability of this so-called doctrine to the present case we cannot do better than quote the language of *C. J.* in *Lakshmappa* v. *Ramava,*[1] in discussing the validity of the adoption of an only son. " To such a case the *factum valet* principle is wholly inapplicable for the attempted adoption would be as regards her (the mother of the only son) not *quod fieri non debet* but *quod fieri non potuit.* Where there is an absence of authority to give there cannot be any gift. The attempt to give is a mere nullity. In such a case the court should not be asked to set aside the transaction but to declare it to be null and void *ab initio.* There in such a case no *factum* and the maxim *quod fieri non debet factum valet* does not apply." In the matter of adoption, it is settled law that a gift of the boy by the mother during the lifetime of the father without his consent renders the adoption invalid. And this conclusion has been reached notwithstanding certain texts[2] which apparently place the mother's right on an equal footing with the father's.

But the mother's right to bestow her daughter in marriage is nowhere declared to exist during the lifetime of the father. The reason is all the greater, therefore, for holding that marriage in which the girl is given by the mother without the consent of the father and in disregard of his authority is invalid. The legal characteristic which is common to adoption and to marriage is the *transfer of the boy or the girl from the dominion of the parent or lawful guardian to the dominion of a stranger. Such, at any rate, was the primitive notion underlying the ideas of adoption and marriage. The gift or transfer could therefore be made only by the persons who were in law the owners according to the ancient view. Treating children however not as subjects of ownership but as persons, provision for whose happiness and welfare should engage the deepest solicitude and consideration of the guardian, it does not [*636]

1. (1875) 12 B. H. C. R. 364 (393 and 397).

2. 'That (boy) equal (by caste) whom his mother or his father (affectionately) gives (confirming the gift) with (a libation of) water, in times of distress (to a man) as his son must be considered as an adopted son (*Datrima*)'—Manu, IX. 168: S.B.E. 25, p. 361.

seem logical to hold that the law should recognize any such provision as valid when it is made by a person other than the one to whom the law specially entrusts the duty as the best fitted to discharge it with advantage.

Two more arguments in favour of the validity of the marriage under consideration, are added by the learned judges at the end of the judgment which, if they are limitations upon the broader statement of principles in the earlier part of the judgment, weaken the force of their previous reasoning. The first is, that the mother is also among the legal guardians and that she is entitled to be consulted by the paternal kinsmen as to the betrothal of her daughter. It will be clear from what has been already said that the various guardians enumerated in the Smritis can never exercise the right simultaneously and that they can act in that capacity only successively. The fact that the mother is entitled to be consulted by the paternal kinsmen does not show that the mother can act without consulting and procuring the consent of the father. The other argument is that because the mother pours water into the father's hand at the time of marriage, the gift is in religious theory the joint act of the father and the mother and that the mother's position is higher than that of the other legal guardians. It may be admitted that the mother's right is in a sense superior to that of the other contingent guardians in marriage. But the marriage of daughters is not the only act in which the Hindu husband is directed to secure the co-operation of his wife. In performing a sacrifice, for instance, a *Grihastha* (house-holder) is obliged to secure her presence and co-operation. But it cannot be inferred from this that a sacrifice is the joint act of the husband and the wife or that the wife is competent to perform a sacrifice independently. The presence or assistance of the wife in all these matters is merely
[*637] as an auxiliary to her husband. The real source *of the mother's right is stated in *Medhathithi's* commentary on Manu, V, 151. The mother has also dominion over children because they are as much her offspring as of their father, and *Medhathithi* concludes by saying that the parents should act in mutual dependence. Whatever the mother's act of pouring water into the father's hand may prove, it certainly does not prove that the mother is entitled to act independently of the father. On the other hand the Smriti-writers are only too fond of proclaiming[1] the permanent unfitness of women for independence.

1. By a girl, by a young woman, or even by an aged one, nothing must be done independently, even in her own house. In childhood a female must be subject to her father, in youth to her husband, when her lord is dead, to her sons; a woman must never be independent."—Manu, V, 147, 148, S.B.E. 25, p. 195. See also *Yajnavalkya*, I, 86.

Turning now to the decisions quoted by the learned judges, there is no case on all fours with the present one. Five cases are quoted by their lordships of which in three cases the father had by his abandonment of his daughter and by his conduct in other respects incurred a forfeiture of his right of guardianship. In the Madras case S. A. No. 566 of 1889, the father had expressed his assent to the particular match and had differed from the mother only as to the price to be demanded from the bridegroom, a matter which ought not to have entered into the calculations of a guardian at all. In the case of *Brindabun Chandra Kurmokar* v. *Chundra Kurmokar*[1], the parties seem to have been governed by the Bengal law and the widowed mother would have been the owner of the property which was liable to be charged with the expenses of the marriage of her daughter. The contest there was between the paternal uncle and the widowed mother and the decision merely followed the principle laid down in *Namasevayam* v. *Annammai Ammal.*[2]

In *Bai Rulyat's case*[3] and in *Modhoo Soodun Mookerji* v. *Jadub Chunder*[4] observations are no doubt made that want of the guardian's consent does not affect the validity of the marriage. The statement of such a broad proposition of law was not necessary for the decision of those cases and the *dicta* appear to have been rather thrown out offhand than enunciated after mature consideration. The decision of the Bombay High Court in *Khushalchand Lalchand* v. *Baimani*[5] appears to be the only considered judgment in the matter, though even here the facts of the case did not require the *statement of such a broad proposition. It is argued by the learned Chief Justice that, as there are no texts declaring that a marriage without gift is invalid, the rules about gift are merely directory. It cannot be laid down as a sound principle of interpretation that whenever the law expresses its command in affirmative and not n negative or prohibitory language, or whenever the law does not declare the infirmative or penal consequences of failure to comply with its provisions, the provisions should be regarded as merely directory and not imperative. The adoption of an only son, for instance, is prohibited by the Smritis but it is nowhere laid down that the adoption, if made, is void.[6] Yet the Bombay High Court has held that such an adoption, if made, is a mere nullity, see *Lakshmappa* v. *Ramava.*[7] Nor is the affirmative or negative form [*638]

1. (1885) I.L.R. 12 C. 140.
2. (1869) 4 M.H.C. 339.
3. (1840-8) 1 Bellasis Rep. 43.
4. (1865) 3 W.R. 194.
5. (1886) I.L.R. 11 B. 217.
6. This argument has not much force now as the adoption is held to be valid :—ED.
7. (1875) 12 B.H.C. 364.

of the language employed any certain indication of the directory or peremptory character of the rule. Thus in Manu, III, 8, it is laid down: "Let him not marry a maiden with reddish hair, nor one who has a redundant member, nor one who is sickly, nor one either with no hair (on the body) or too much, nor one who is garrulous or has red (eyes)." Yet no one will contend that the marriage of a garrulous or a redhaired maiden would be invalid. On the other hand if there is any precept more imperative than any other, it is the one relating to prohibited degrees. The rule is thus laid down in Manu, III, 5: "A (damsel) who is neither a *sapinda* on the mother's side, nor belongs to the same family on the father's side, is *recommended* to twice-born men for wedlock and conjugal union." Notwithstanding the merely commendatory way in which the rule is expressed, disobedience of it would be utterly fatal to the validity of a marriage. The true principle of construction then is, not to be guided by the mere form of the language in which the particular rule is couched, but to analyze the essential elements of the transaction which the rule is intended to regulate, and to ascertain whether the rule in question touches any of those essential elements or not; and whether a compulsory observance of the rule is required by the spirit of the law and by considerations of general expediency. Adopting this test, it may be affirmed without hesitation that the Hindu Law, which recommends the marriage of girls below the age of puberty, does contemplate that the choice of a suitable husband, which they are themselves by reason of their
[*639] *tender years incapable of making, should be made for them by others who are competent, and that this choice should be made not by any person at random, but only by those persons whom the law regards, from their relation to the girl and their general capacity, as best qualified to discharge the function. It is in view to the best interests of the girls themselves that the law has prescribed the particular persons who can act as guardians and the order in which they can so act. The social difficulties which would be felt by girls once improperly married in getting married again have been over-rated and even, if true, the proverbial danger of hard cases making bad law deserves to be remembered. The inconvenience felt by a few girls in contracting marriage after having once gone through an invalid marriage ceremony would be a thousand times compensated by the advantage to millions of girls of being bestowed in marriage by their legal guardians. This consideration is specially weighty at the present time when more enlightened notions on the subject of marriage are finding their way among the people, when there is a general desire on the part of educated men to postpone the marriage of their daughters as long as possible, and this

desire is thwarted and opposed by their as yet less enlightened wives. But as a matter of fact the social difficulties imagined by their lordships are not so formidable. It is only when the marriage has been followed by cohabitation, that real inconvenience will be felt in contracting a fresh marriage. Except among the Sudras, girls are married before puberty, and there is an interval of varying length between marriage and consummation. If the father does nothing in this interval to show that he treats the marriage as a nullity, but merely acquiesces in the marriage, his assent to it before it is performed may be presumed. If the marriage is celebrated under circumstances from which the father's assent cannot be presumed or in the teeth of his prohibition, but he is afterwards disposed to acquiesce in it, the right infringed being that of the preferential guardian who does not seek to invalidate the marriage, it will stand valid. If the father has taken no steps to get his daughter married till she is on the very verge of puberty, he incurs a forfeiture of guardianship and the mother or whoever is the next legal guardian in marriage may validly bestow the girl. (*The King* v. *Kistnama Naick*)[1]. If a girl is married *after puberty as among the Sudras [*640] but without the consent of the father, the marriage may be upheld as one in which the power of the daughter to dispose of herself having arisen has been exercised by her.

Neither in the Bombay decision, nor in the one under review do the judges consider the pernicious consequences to which a logical extension of their doctrine will lead unless they propose some arbitrary limitations. It would be open to any stranger, if gift is held unessential, or to any distant kinsmen if only a gift by any one of the persons enumerated in the text is required, to dispose of a girl in marriage without the consent or knowledge of their parents provided that in either case he is cautious enough not to employ fraud or force. The bridegroom selected may be a scoundrel or a madman, a pauper or a leper, and yet the parents will be helpless. The courts may perhaps strain the definition of that elastic word fraud and call it a case of fraud. But how can there be any fraud when the parents are said to possess no right of guardianship but only to lie under a duty. It is not here intended to suggest that the order of guardianship in marriage laid down in the *Smritis* should be rigorously followed irrespective of the actual guardianship of girls. On the other hand a marriage celebrated by the *de facto* guardian in peaceful custody of the infant, should be held valid even though he may not be entitled under the texts. The persons enumerated in the texts do not become guardians unless they accept

1. 1 Norton's L.C. 201.

the duty, and it is open to them to waive their guardianship. Wherever the actual guardian is different from the person who would be entitled under the text, it would be treated as a case of waiver by the latter. The texts were probably intended to declare the order not of guardians in marriage merely, but of guardians of the person and property also generally, for no texts are to be found on guardianship generally. If the judges had followed the strict letter of the Hindu Law that gift by the legal guardian is essential to the validity of marriage, and that during the father's lifetime, the mother has ordinarily no right to act as guardian, they would have moved with the spirit of the times[1] and advanced the cause of reform. Nor can it be said that it is not for the judges to concern themselves with considerations of what is suitable to the times. For the judges have always, openly at times, but more often
[*641] covertly under the guise of applying the law, *extended it and shaped it to suit the exigencies of their own times. It was avowedly on this ground that the judges made a great advance on the law in the case of *Namasevayam* v. *Annammai Ammal.*[2] It is therefore to be regretted that the decision under review can be justified neither on the ground of conformity to the strict Hindu Law nor on the ground of adjustment of the Hindu Law to the requirements of the present.[3]

P. S. SIVASWAMY AIYER.

[The principle of the decision in the above case has been approved and followed by the Bombay High Court in the cases of *Bai Diwali* v. *Moti Karson*[4] and *Mulchand Kuber* v. *Bhudhia.*[5] It may be remarked that one of the two judges who decided the above two cases was an Indian judge and a great social reformer more avowed and pronounced than even the learned writer of the article. In the former case the marriage was effected by the mother, in disobedience of the order of a civil court directing her to make over her minor daughter to her paternal uncle for the purpose of getting her married. In the second case the exact point raised and decided in the Madras case under discussion came into question.

1. Is it with the spirit of the times to hold that the mother has no voice and has still the subordinate place ascribed to a woman under ancient Hindu Law ?—Ed.

2. (1869) 4 M.H.C. 339.

3. The observation of their lordships in the course of the judgment that according to Hindu Law and custom, a Brahman girl must be married before maturity ought not to pass without notice. Though the duty of giving girls in marriage before puberty is strongly enjoined on the guardians both by law, and custom, marriage after puberty if otherwise duly celebrated will be valid in law. See Manu IX. S. 89 to 94; *Gautama* XVIII. S. 20 to 24; *Baudhayana* IV. 1, 14; *Narada* XII. S. 24 to 27; *Aswalayna Grihya Sutra*, D. B.-I. Ch. 8, S. 10, 12; Banerjea's Stridhan and Marriage, p. 47.

4. (1896) I.L.R. 22 B. 509. 5. (1897) I.L.R. 22 B. 812.

The mother gave her girl in marriage without obtaining the consent of her husband. It was found by the Appellate Court that the marriage was not an improper one. It was held that the marriage was not vitiated by the absence of the father's consent and that it could not be set aside. The same principle was adopted by the Allahabad High Court (*Banerji* and *Aikman, JJ.*,) in *Ghazi* v. *Sukru*[1]:—ED.]

PARASARA MADHAVIYAM.

And there need not be any doubt as to the status of husband and of wife being established in the forms of marriage beginning with the *Gândharva*, for want of (the ceremony of) 'going round seven steps, etc.' For though these (ceremonies) are absent before taking (the bride), they take place subsequently. So says *Devala* :—"In the *Gândharva* and other marriages, the marriage ceremony should be performed again[2] in the presence of the fire, by all the three castes, when he (the bridegroom) is able[3]. Also in *Grihya Parisishta* :—"In the *Gândharva*, the *Asura* and the *Paisâcha*, and in the *Râkshasa*, the marriage (lit. taking by the hand) takes place first, and the *Homa* (sacrifice) is ordained subsequently." If the *Homa* be not performed, the status of wife (does) not arise. Hence *Vasishta* and *Baudhâyana* say[4] :—"If a maiden taken away by force has not been wedded with sacred texts, she is fit to be given to another with due forms, (for) she is even as a maiden." Therefore as the (ceremony of) going round seven steps takes place, the relation of wife exists even in forms of marriage beginning with the *Gândharva*.

The gift, which has been spoken of in the forms of marriage beginning with the *Brahma*, takes place only once. And so **Yajnavalkya says*[5] :—"Once is a maiden given: one taking her back will get the punishment of a thief." Also Manu :[6]—"Once is the partition (of the inheritance) made; once is a maiden given; [*642]

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1. (1897) I.L.R. 19. A. 515.

2. The taking of the bride is regarded as one of the ceremonies: hence the use of the word पुनः (again).

3. The Sanskrit is "*Samarthena, i.e*, by one able, *i.e*, when he is able." This reading which occurs both in the Calcutta and the Telugu Editions appears to be wrong. *Kulluka Bhatta* quotes this verse in his commentary to Manu, Ch. VIII, S. 226, but reads *Samayena, i.e*, according to rule.

4. Ch. XVII, S. 73, S.B.E. 14, p. 92. 5. Ch. I, S. 65.

6. Ch. IX, S. 47, S.B.E. 25, p. 335.

once says (a man) 'I give'; these three occur each[1] once only." And this is intended to apply to a blameless suitor. For *Narada* says[2] :—" He, who having gifted according to rule[3] a maiden to a suitor does not deliver her, shall be punished by the king as a thief, if the suitor is faultless." Is this a general rule or precept[4] ? No, says *Yajnavalkya*[5]—" Should a suitor, better than the previous one come in, he may take her away though given." This is intended to refer to a verbal gift. If a better suitor than the one to whom she has been verbally given is available, then she should be given to him and not to the prior one who is blameworthy. And so, *Gautama* :—" Even after having promised, let him not give to one unrighteous." And the blemishes in a bridegroom, are stated by *Katyayana* :—" Madness, being an out-caste, leprosy, impotence, being born of the same *gotra*, being devoid of sight and hearing, and being afflicted with epilepsy, these are stated to be the blemishes in a suitor as also in a maiden." As to the re-marriage of a woman once married, shown by *Yama* and *Satatapa* :—" If the suitor is not by any means of (good) descent and character, sacred texts are not the cause (of the conjugal relation), nor will he (*i.e.*, the giver) be guilty of falsehood regarding a maiden; one should forcibly snatch from him the maiden who retains her virginity; one should give her to one possessing good qualities" : so has *Satatapa* said[6] : " He is not to blame if he takes away the maiden from one who is inferior in birth and character; the *mantras* (ritual) are no reason against it, nor will he (*i.e.*, the giver) be guilty of falsehood regarding a maiden." Also *Katyayana* :—" But if he is of another caste, or an out-caste, or impotent, or one practising acts forbidden (to his caste), or is of the same *gotra*, or is a slave, or has a long-standing disease; let her (the maiden) though married (to him) be given away to another man with her cloths and jewels." Also Manu[7] :—" When he is lost, is dead, has retired from the world, is impotent, or is an out-caste: in (these) five cases of distress, another husband is ordained to women." This re-marriage has reference to a different *Yuga*. And so in *Aditya purana* :—" Let him

1. The reading here adopted is त्रीण्येतानि सकृत्सकृत्. Another reading is त्रीण्येतानि सतांसकृत्, *i.e.* " These three occur among the good once only" :—Ed.

2. Ch. XII, S. 32, S.B.E. 33, p. 172.

3. The reading here adopted is दत्वान्यायेन. Another reading is दत्वाकान्ताय: the meaning then is " having gifted a maiden to a handsome suitor :—Ed."

4. उत्सर्ग, *i.e.*, a general precept applicable everywhere (without exception) as opposed to अपवाद which is a special rule or exception :—Ed.

5. Ch. I, S. 65.

6. *Satatapa* V, S. 8, 9.

7. This must be Narada XII, S. 97.

not practise (these) five in the *Kali* (age): re-marriage of a *woman already married, giving the eldest son's (or brother's) share,[1] killing a cow or a bull, (raising children on) a brother's wife, and (taking) *Kamandalu* (the water-pot of a Sanyasi)[2] [*643]

Narada says[3] that one who gives away a bride without disclosing her defects should be punished by the king:—"The king shall inflict the punishment prescribed for a *Purva Sahasa*[4] on him who gives a blemished maiden without disclosing (the defects)." Also *Yajnavalkya*[5]:—"One giving (a maiden), without disclosing defects, should receive the punishment of *Uttama Sâhasa.*" The blemishes of a maiden have been pointed out by *Nârada*[6]:—"Being afflicted with a chronic or disgusting disease, being deformed, loss of virginity, ***being wicked, and having her heart set on another***[7]—these are stated to be the defects in a maiden."

Not only is the person who gives without disclosing blemishes liable to punishment, but Manu says[8] that she too should be given up:—"Even though he has received her in due form, let him give up a maiden who is blemished, diseased, deflowered, or has been given fraudulently." Also *Narada*[9]:—"Let not one calumniate an unblemished maiden, nor let one calumniate an unblemished suitor. But if there is a blemish, neither of them acts wrongly in giving up the other." This should be understood to be prior to going round the seven steps: for it is only then that the relationship of wife is established. Hence Manu[10]:—"The distinctive mark of a wife is fixed by the *Panigrahanika* (i.e., marriage) *mantras* (ceremonies): their completion should be understood by the learned to be at the seventh step." Also *Yama*:—"A husband is not ordained to a maiden by (pouring) water or by oral (gift): but the relation of husband (is effected) by the ceremony of marriage at the seventh step." On the death of the man who marries, prior to the ceremony of marriage (being completed), maidenhood does not cease. Thus *Vasishta*[11]:—"If the suitor dies after (the maiden) has been given orally (*i.e.*, promised) and with water, but she has not been married with recital of *mantras*, she remains only as the father's (unmarried) daughter."[12]

1. The right of primogeniture or the right of the eldest son to a larger portion of the patrimonial property than his brothers:—Ed.

2. *i.e.*, becoming an ascetic. 3. Ch. XII, S. 33: S.B.E. 33 p. 172.

4. See *ante* note at page 115. 5. Ch. I, S. 66.

6. Ch. XII, S. 36 S.B.E. 33 p. 172.

7. Here the text adopted is दुष्टान्यगतभावा. Another reading is दृष्टान्यगतभावा *i.e.*, one who is known to have her heart set on another:—Ed.

8. Ch. IX, S. 72: S.B.E. 25 p. 340. 9. Ch. XII, S. 31: S.B.E. 33 p. 172.

10. Ch. VIII, S. 227: S.B.E. 25 p. 295. 11. Ch. XVII, S. 72: S.B.E. 14 p. 92.

12. The Telugu Edition adds "And this marriage has reference to another *Yuga.*"

[*644] **Katyayana* mentions a special rule in the case of (the bridegroom) going away to other parts after choosing (the bride):—"Should any man be unheard of after choosing, then let the maiden, after waiting for three years[1] choose another bridegroom." Also *Narada*[2]:—"When one having received a maiden, goes away to another country, let the maiden choose another husband after three ritûs (periods of menstruation).[3]

Manu states what is to be done when the bridegroom dies after paying *Sulka*[4]:—"If after *Sulka* has been paid to the maiden, the giver of the *Sulka*[5] dies, she should be given to the husband's brother, if she consents." A special (different) rule has been stated by *Katyayana* when (the bridegroom) goes away to another country,—"When a man goes away after giving *stridhana* to a maiden and *Sulka*, she should be kept back one year, and (then) duly given to another."

And thus, what has been said is, that on finding a blemish or on the death (of the bridegroom), etc., from the time of the oral gift till before going round the seven steps, (the bride) may be given away to another. Hence *Katyayana* says:—"Though a maiden has been given to several persons, if she has not been married, (the first) who has returned[6] may, of all, get her. But should he return after she has been married, the previous bridegroom shall recover (the money) paid." The meaning is—if she is unmarried, *he* only gets the maiden to whom she has been first promised: but if she has been married to another, he can only recover the *Sulka* paid by him but *not* the maiden.

[† So also Paithinasi: "If a maiden (of the same caste) is not to be had he shall observe the vow of a Snâtaka; or he may (by marrying a Kshatriya female) beget a child on her; or according to some on a Sudra wife." So also Vishnu.[7]: "To a twice-born man (Dwija) a Sudra wife should never become fit for religious

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[† The following passages in square brackets i.e., pp. 50 to which were omitted in the original edition are now given as they explain the rules of interpretation peculiar to Hindu Law:—Ed.

1. Another reading is ऋत्वागमांस्त्रीन् which mean three (periods) of menstruation:—Ed.

2. Ch. XII, S. 24: S.B.E. 33. p. 170.

3. Another reading is संवत्सरमतिक्रम्य which means "after a year":—Ed.

4. Ch. IX, S. 97: S.B.E. 25. p. 344.

5. The person meant here is apparently the bridegroom.

6. Consistently with the explanation given by Madhava this means "the person who has obtained this promise first and who has returned:—Ed.

7. Vishnu Smriti Ch. XXVI, S. 5: S.B.E. 7 p. 112.

duties. To a person blind with lust she is stated to be (his wife) only for the purpose of sexual intercourse." Hence according to the opinion of these (sages) the taking of a Sudra wife though it has only love for its fruit is owing to its being less blameable and allowed to the twiceborn when they cannot get others (lit. in difficulty). Now according to the opinion of others (*i.e.*, other sages) it is said that the Sudra woman should ever be avoided by the Brahmin and Kshatriya and that marriage (with her) is very improper. Hence Manu says:[1] "A Sudra woman is not mentioned even in any ancient story (Purana or Itihâsa) as the wife of a Brahmin or a Kshatriya though living in distress (*i.e.*, although he may never get one among his own caste). Men of the twice-born castes marrying in their folly women of low caste degrade their families with their children to the state of Sudras. One who marries a Sudra wife becomes degraded according to Atri and the son of Utathya; according to Saunaka on the birth of a son and according to Bhrigu on the birth of a son's son. A Brahmin who takes a Sudra wife to his bed will sink into hell; begetting a child by her he is dropped (or cast) away from Brahminism. No expiation is prescribed for him who drinks the moisture of the lips of a Sudra woman who is tainted by her breath and who begets a son on her." So also in the Aswamedha Parva (it is said): "The seed of a twice-born falling on the organs of a Sudra woman crying aloud with an exclamation of grief is sorry for having fallen into a cave (or ditch) ordure. 'This wretch (sinner) fatuated by sexual desire has degraded me down. He will soon become degraded,' so cursing it falls down."

If it is said that as according to the passage of Manu[2] "To a Brahmin the three aforesaid as also one of his own (caste)" the marriage of a Sudra woman to a Brahmin is permitted by Manu and as again it is forbidden by him in the passage[1] "never to a Brahmin and a Kshatriya" there is a contradiction, it is not so owing to the propriety of the legal opinion (or decision) that they relate to differences of opinion or of Yuga." Hence this difference of opinion (among Smriti writers) is clearly shewn by Yâjnawalkya[3]: What is said by some that to the twice-born the taking of a wife is (permitted) is not my view as this man is again himself born in her." So also in the Anusâsanika Parva: The wise do not speak well of a son borne to a Sudra woman. Others say that a Sudra woman ought not to be resorted to even for the purpose of (sexual) love.

1. Manu III, S. 14 to 19: S.B.E. 25 p. 78. 2. Manu, III S. 13. S. B. E. [25 p. 77
3. Yajnawalkya I, S. 56.

The decision that it relates to difference of Yuga is also clearly shewn in another Smriti. For instance after enumerating in order the passages beginning with "To the twice-born marriage of maidens of unequal caste" it is wound up by the passage "The wise say these dharmas (practices) must be avoided in the Kali Yuga."

The marriage rite or ceremony is described by Manu[1]: 'Among women of equal or same caste the ceremony of joining, the hands is prescribed. In marriage among women of unequal caste know that the following rule (applies). On marrying a man of a higher caste the Kshatriya bride must take hold of an arrow, a Vaisya maiden (bride) of a goad and a Sudra (bride) of the hem of (bridegroom's) garment." So also Sankha and Likhita: "A Kshatriya woman takes hold of an arrow; a Vaisya woman of a goad; a Sudra woman of the hem or skirts of a garment. A Brahmin, however, must take hold of the hand of a woman of equal caste." Paithinasi says: "Let him take hold of the hand with the thumb of the Brahmin maiden. A Kshatriya maiden of the arrow; a Vaisya maiden of a goad; and a Sudra maiden of the hem of the (bridegroom's)garment. To a Brahmin, walking round (the Agni or fire) is declared; to a Kshatriya and Vaisya walking round by the Acharya.

Manu declares the ceremony of approaching (his wife) by a married man[2] Let him (the husband) approach his wife in due season, being constantly satisfied with her alone; he may also, being intent on pleasing her, approach her with a desire for conjugal union avoiding the Parva days."

The Ritu is the period composed of 16 days and nights commencing from the appearance of menses and well-adapted for conception. In such Ritu (or season) always desirous of issue let him approach the woman. He must only cohabit with his wife. Although in season the Parva day should be avoided. Even though not in season and even without reference to (begetting) issue he shall, on being solicited by her, approach her. Yajnawalkya thus explains the ritu abovementioned.[3] The nights favourable to women for conception are 16. He shall cohabit on even nights. (Thus cohabiting) he remains chaste. He shall exclude the Parvas and the first four (nights)."

In this season avoiding the Parva days and the first four nights he may approach her for the purpose of progeny on even nights.

1. Manu III, S. 43-44. S. B. E. 25 p. 83.
2. Manu III.S. 45, S. B. E. 25 p 83. Cf. Yàjnawalkya I, S. 80,81.
3. Yâjnawalkya I, S. 79.

from the 6th day. No approach on uneven (nights) is due to the fear of begetting female children but not on acccunt of any prohibition. The cohabitation even though on uneven days is only during the night and not during the day-time owing to its being prohibited.

Hence the Atharva Veda says[1]: " Those verily dry up life who by day enjoy love; those who enjoy love by night only forfeit continence (the position of a Brahmachari)[2]" So also Sankha and Likhita: "During the Ritu season there should be no cohabitation during the day-time."

By the use of the expression " Let him (the husband) approach his wife in due season " two niyamâs are made known. One Niyama is that he ought to approach in due season and not avoid (her). The other is that he ought to approach her only in due season and not otherwise at other than proper season[2]. Hence Devala says: " If one being in good health does not approach his own wife who has bathed after menses destroys the fætus and is guilty of the sin of infanticide." " So also Baudhayana[3] :- " He who does not approach his wife for 3 years after she has attained puberty undoubtedly is guilty of the sin equal to that of infanticide. They declare that the sin of him who does not approach his wife in due season and of him who approach her not in proper season is equal. So also of one who impregnates at anything not the womb."

By saying " avoiding the Parva days " the days and the Nakshatras (constellations) which are forbidden are implied in addition. The forbidden *Parva days* are Amâvasyâ (the new moon day) and the Paurnamavasya (the full moon day). Approaching the woman then is forbidden by the Sruti[4] : " He should not approach the woman on the new moon and the full moon days. If he approaches he becomes impotent (or destitute of manly strength)." The other forbidden lunar days are the eight and other days. On this Manu says[5]: A twice-born man who is a Snâtaka shall constantly or invariably remain chaste on the new moon-day, on the eighth (lunar day of each half-month), on the full moon day and on the fourteenth even though (they fall) in the period (proper for

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1. Prasna Upanishad Prasna I, S. 13.

2. This is according to the commentator. A more natural meaning is this: those who enjoy love by night are considered as fulfilling the duties of a Brahmachari.

3. Ch. IV. i, S. 18, 19 : S. B. E. 14 p. 315.

4. Taithariya Samhita, Kanda II, Prapataka V, Anuvaka vi S. 4.

5. Ch. IV S. 128. S. B. E. 25 p. 149.

conjugal intercourse.)" In the above passage it has to be understood that in the Amavasya (new moon) and other days "by avoiding cohabitation with the woman (he shall remain chaste). Though in the period (proper for conjugal intercourse) the six days have to be avoided. These are mentioned by Manu himself[1]: ' But among these the first four, the eleventh and the thirteenth are forbidden. The remaining ten nights are recommended." The prohibited Nakshatras (constellations) are shewn by Yajnawalkya[2]: " Thus approaching the slender female and avoiding the constellations Magha[3] and Mula[4]." " Slender," *i.e.*, delicate by (taking) light food. Hence Brihaspati states the special (or the kind of) food for men and women together with the reasons for the same: " When the female energy (or seed) is greater, the issue is a female. If the male energy (or seed) is great it is a male. Hence for the purpose of furthering (or augmenting) the energy (semen virile) let him eat fatty (oily) and stimulating food. Let him ease the female to take light food. Thus he may procreate male issue." Manu also says[5]:—" A male child is produced by a greater quantity of male seed, a female child by the prevalence of the female; if equal, (a hermaphrodite) or a boy and a girl. If weak (or sapless) and deficient (in quantity) a failure of conception (results)." (In the above) a division (is to be made as) " apumân," *i.e.*, (hermophrodite).

The Samkrânti day[6] has also to be avoided owing to its falling under (or being included in) the five *Parvas*. This is stated in the Vishnu Purana[7]: " O king, the fourteenth, and the eighth days (in each fortnight), the new moon and the full moon days—all these are parva days. So also is the day of the sun's entrance into the Zodiac. The person who enjoys oil bath, female and flesh food enters, O king, the hell called Vinamûtrabhôjana."

The places which have to be avoided are also shewn there (in that purana)[8]: "A wise man, O king, should not have sexual intercourse near a sacred tree (fig tree, etc.) growing near a village,[9]

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1. Ch. III, S. 47 : S. B. E. 25, p. 84.
2. Yajnawalkya I, S. 80.
3. *Leonis* i.e., the name of the tenth Nakshatra containing five stars figured by a house.
4. The 19th lunar asterism containing eleven stars.
5. Manu III, S. 48. S. B. E. 25, p. 84.
6. The passage of the sun from one sign of the Zodiac to another.
7. Vishnu Purana Amsa III, Adhyaya xi, S. 114-115.
8. Vishnu Purana Amsa III, Adhyaya XI, S. 118, 119.
9. चैत्य may also mean a place of religious worship.

a courtyard, a palace[1], nor in a place where four roads meet, nor in a cremation ground, a garden and water. So also one who has the tendency to discharge urine (should not discharge in those places)." By the use of the expression "Being constantly satisfied with his wife alone" it is clear that approaching other's wives even in thought is prohibited." This also appears from that Purana[2]: "Other's wives should never be approached even in thought. A wise man thinking that interconrse of men with other's wives gives apprehension in both worlds should approach his wife in season."

What else is to be avoided is shewn even in that Purana[3]: "He should not approach a woman who has not bathed, one who is feeble (or weak), one who is in menses, one disagreeable to him, one who is enraged, one who is worthless (or contemptible), one who is diseased, one who is awkward[4] (or not handy), one who loves another, one without desire, one who is another's wife, one who is emaciated by hunger or one who eats much; so also, if he is himself possessed of these (said) qualities. A person having bathed decorating himself with (garland of) flowers and perfumes and joyful should have sexual intercourse."

The saying "being intent on pleasing her" brings to mind the bridegroom prescribed by the Vedas. Hence the Sruti says[5]:

"He (Indra) went to the womanfolk and requested them to take a third share of (his) heinous crime or sin (Brahminicide). They said 'We pray for a boon (in return). Let us obtain offspring from menstrual discharges and enjoy according fo our desire (sexual intercourse) till delivery.' Therefore women beget offspring from menstruation and enjoy according to their desire till delivery, as this was obtained by them as boon. Receiving the third share of the sin (Brahminicide) she has her menstrual period.".

The meaning is this:—Indra taking with open hands the sin of Brahmanicide committed by slaying his Purohita named Visvarupa and retaining it for a year and afraid of the reproach of the world he divided it (sin) into three and gave with presents (or boons) the first portion to the earth and the second portion to the trees. For giving the third portion he came to the women. They begged for

1. सौध may also mean an upper storey.
2. Vishnu Purana Amsa III, Adhyaya XI, S. 121 to 123.
3. Do. do. do. S. 111 to 113.
4. अदक्षिणा may also mean a woman who is not amiable or obedient.
5. Taitariya Samhita Kanda II, Prapataka 5, Anuvaka 1 S. 5.

a boon, *viz.*, Let us beget issue by (our husbands) approaching in due season (after the menstruation period). Let us enjoy from the time of delivery according to our desire though in unfit season. Obtaining the boon they received the third portion. This portion has been transformed into the menstrual excretion. From that time a female becomes a menstrous woman each month. Yajnawalkya also says[1]: " Or remembering the boon granted to women, he shall according to his (sexual) desire and be devoted to his wife as it has been declared that women should be protected."

Brihaspati also says: " A man should zealously have cohabitation during season; or always (only) avoiding the Parva days, as this is the desire of women." As regards " cohabitation during season " some say in this manner :—This is a *Niyama* only for a sonless man and not for one having a son. They also justify or examine (the same). Of these, it is said in the Kûrma Purana[2]: " He may approach during season until a son is procreated."

The procreation of son is for the purpose of discharging debts. Thus the Srutri[3]: A Brahmin (as soon as he is) born becomes a debtor in three respects, *viz.*, To the rishis (sages) by (reason of his) religious studentship (Brahmacharya), to the devas (gods) by sacrifice (yajna), to the pitris (manes) by progeny (prajâ). This man only is not a debtor who has progeny, performs sacrifices and practises religious studentship."

So also in the Mantra (portion of the Vedas)[4]: ' A father if he sees the face of his son born alive connects this person (son) with his debt[5] and also obtains immortality." The aforesaid[6] discharge of debts arises by the procreation of one son as by reason of this (only son) he attains the condition of possessing a son." " Thus Manu says[7]: Immediately on the birth of the first-born son a man becomes the father of a son[8] and is freed from the debt to the manes. Therefore, that (son) is worthy to receive the whole (estate). That son alone on whom he throws his debt and through whom he obtains immortality is produced by a sense of duty; all the rest they consider as the offspring of desire." Now if it be said that the possessing of many sons is also declared somewhere in the

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1. Yajnavalkya I, S. 81.
2. Kurma Purana Bhaga I, Adhyaya II, XV, S. 11.
3. Taittariya Samhita Kanda VI, Prapastaka, iii, Anuvaka 10, T. 5. This occurs n the Brahaman a portion of the Taittariya.
4. Aitariya Brahmana VII, III S. 4.
5. *i.e.*, throws his debt on him.
6. *i.e.*, what is stated in the above sacred texts.
7. Ch. IX, 106, 107 : S.B.E. 25, p. 346.
8. *i.e.*, a person possessing a son.

Sruti as (in the following) :—" O bountiful Indra, please make this woman as one possessing children and happy (or fortunate). Give her 10 sons and make her husband the eleventh[1] son.[2]"—" Playing with sons[3]"—also "(God Agni) gave (me) wealth and sons.[4]" Yes (that is so). But this is not a *Vidhi.* It is, however, a commendation (or panegyric) of many sons. Hence, this is a Niyama for approaching in season only for a person who has no son.[5] Others do not submit to this.[6] Although it be true that the state of possessing sons and of non-indebtedness is attained even by an only son, nevertheless there is Vidhi for possessing many sons, as it is repeated in the sacred texts of Chandogya: " The sage Kaushitaki thus addressed his son :—' I sung this only. Hence you became my only son. You will get many sons by repeated meditation of the rays[7].' The meaning of this is this :—The sage named Káushitaki by contemplating himself only upon one disc of the sun and singing his praises obtained as a fruit thereof one son. He said (to his son) : ' I contemplating upon this—one only son—sung his praises. Hence by reason of this defect you became my one (only) son. Possessing one son is not commendable. Therefore, for possessing many sons you will repeatedly contemplate on the many rays (of the sun) in the service time (*i.e.,* in the time of contemplation).' " So also in the Mahabârata it is said[8]: " O Bhârata, in this (our) great race you are my only one son. Those who discuss dharma (law or duty) declare that a person having one son is a sonless man. O Bhârata one eye and (one) son may be treated as existing or as non-existent. On the destruction of an eye there is destruction of body. On the destruction of (one) son, there is destruction of the family. O son, I grieve (very much) on thinking of the transient (or fleeting) existence of men. I desire for the non-destruction (perpetuation) of line. Prosperity attend you." If it is said that the begetting of many sons becomes unprofitable (or purposeless) as the state of non-indebtedness is being attained by (the birth of) the eldest son, it is not so.

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1. *i.e.,* he must be treated as a son.
2. Rig Veda Samhita Ashtaka VIII, Adhyaya iii, Varga 28, S. 5.
3. *Ibid* S. 2. 4. *Ibid* S. 1.
5. Lit. who has produced no son. 6. *i.e.,* do not agree with this.
7. Chandogya Upanishad, Adhyaya I, Kanda V, S. 2.
8. Adi Parva, Adhyaya 100, vs. 61 to 65. Vide Kumbaconum Edition, Adhyaya 108, vs. 65, 66, 68, and 69. This is addressed by the King Santanu to his son named Deva Vrata (or Bhishma).

Because all sons become the cause of (the attainment of) non-indebtedness. By the mere birth of sons the father does not attain non-indebtedness. Then by what? When religious rites (Karma) are being done according to the Shastra by a son well taught; the state of non-indebtedness is subsequently attained (by the father). For this reason, the Vidhi about the instruction of the son is well repeated (stated) in the Vajasanêyi Brâhmana [1]:—" Hence is, a son instructed is stated to be conducive to the attainment of the next (or a better) world. Hence he instructs this person (son). That son releases him from everything caused by his doing (the ceremonies in a slight degree not according to the Sastra. Hence the name Putra. He (the father) lives in this world through the son alone."

The meaning of this text is this:—There is a certain (religious) rite (Karma) named *Sampratipatti*—When the father is on death-bed he calling his son ought to instruct him in all those which ought to be done in the study of the Vedas, in sacrifices and in temporal (or worldly) matters (transactions). This is (what is known as) *Sampratipatti.* He who is taught this *Sampratipatti* for whatever reason becomes the rightful son. In this *Sampratipatti* the son who is instructed becomes qualified (to perform it). Hence those versed in the Sastra declare the son thus qualified as conducive to the attainment of the next world. Therefore, fathers should instruct their sons. That son (thus) instructed by himself doing well the act authorized by sacred precept releases (or redeems) the father from all the sin (which may attach to the latter) when any act or rite authorized by sacred precept is done by the father to a slight extent not in conformity to the Sastra. Hence he is called by the derivation:—" He releases from the hell called Put." Hence the father although deceased lives in this world through (or by) the body of the son doing acts according to Sastra.

Thus while many sons exist, the instruction will be possible only to some owing to diverse impediments (or disqualifications) such as foolishness (want of intellect) etc. Although there may be many who are instructed only one can do it according to law. Hence he who whether elder or younger is like the one described above is alone the cause of non-indebtedness. Hence it is said in the Purana: " Many sons are desirable, as even one (among these) may go to Gaya.[2]" While this is so (*i.e.*, on this construction) the mantras such as those beginning with the text [3]—" Beget in this

1. Brihadâranya Upanishad, Adhyaya, I, Kanda 5, S. 17.

2. Vishnu Purana 85, S. 67.

3. Rig Veda Samhita Ashtaka VIII, Adhyaya iii, Varga 28, S. 5.

woman ten sons "—confirm the rule as to having many sons. As to what is stated by Manu,[1] *viz.* "The others are produced by desire" relates to sons not instructed. Therefore, he must certainly approach in season, although having a son.

Devala mentions the order of approaching in season where there are several wives. "While there is the contemporaneousness of the seasons he may approach (them, in the order of castes; or her who has no son for the sake of protection; or in the order of marriage) in the case of wives of the same caste." *Thirtha* means *Ritu* (season). While there is this contemporaneousness of the season, he may approach in the case of wives of unequal caste, in the order of caste and in the case of wives of the same or equal caste in the order of marriage. While one wife has no son and the other wives have sons he may approach first the wife who has no son. Even with reference to the season Devala mentions the difference (contraction or diminution) in the period of approaching by reason of the difference of caste. "Twelve days are declared in the Veda (to be the period) for the Ritudharanam in a Brahmin woman; for the rest ten, eight and six are respectively prescribed." It must be understood that the counting of the twelve, etc., (days) is from the fifth day. The approach (of the woman) in the fourth day is optional as it is both prescribed (or ruled as compulsory) and forbidden. Harita rules it as compulsory[2]: "The Garbhadhanam of a woman bathed after menses is either on the fourth day or on the even days." Vyasa prohibits it[3]: She ought not to be approach-

1. Manu, Chapter IX, S. 107. 2. Harita II. S. 9.
3. Vyasa. II. S. 43: Dutt 513.

Vikalpa (or an option) declared by law is of *three* kinds:—(*a*) *Vyavasthitha Vikalpa*, (*b*) *Aichhika Vikalpa*, and (*c*) *Sambhavat Vikalpa*.

(*a*) A *Vyavasthitha Vikalpa* is that illustrated in the text. The option is declared in two different texts. Here there is authority for differentiating the two texts.

There are two vedic texts which declare that the same particular sacrifice should be performed before sunrise and after sunrise. According to one Sakha (i.e., Suklayajus) the sacrifice should be performed before sunrise; according to the other Sakha it must be performed after sunrise. Hence this is called an option declared by law (Vyavasthitha Vikalpa.

(*b*) An *Aichhika Vikalpa* is an option according to one's desire as when option is declared in the same text. Here there is no authority for differentiating as in the above. Hence the construction is that the thing may be done or not done at your option· अतिरात्रे षोडशिनंगृण्हाति. In the sacrifice named Atirathra, the Soma juice should be received in the vessel. नातिरात्रे षोडशिनंगृण्हाति. In the sacrifice known as Atirathra the Soma juice should not be received in the vessel. Here there is no authority for declaring that these two texts apply to two different sets of schools or for differentiating in any other manner. Hence the thing may be done or not done at one's own option or desire.

(*c*) *Sambhavat Vikalpa* or an option according to circumstances व्रीहिभि र्वायवै र्वा-जुहुयात. He should sacrifice either by grains of rice or of barley. Here of the two kinds of grain whatever is available may bo used.

ed on the fourth day. If she is approached, she produces a short-lived son. This is a Vyavasthitha Vikalpa (an option fixed or declared by law) as in the case of the Udita[1] and Anudita[2] Homa (sacrifice).

If the menstruation ceases on the fourth day it is a Vidhi (Vidhi). If it does not cease, it is a prohibition (Pratisedha). Hence Manu declares[3]: " A menstruating woman by bathing after the menstrual secretion has ceased (to flow) becomes fit (or pure) or eligible." " Sâdhvî." The meaning is fit or eligible for such rites or religious acts prescribed (by the Sastra) as the impregnating ceremony, &c. The Linga Purana mentions the special fruits (or advantages) of approaching on special days.

Vyasa mentions an exception to what is said about the transgression in consequence of not approaching in due season : " The sin of killing an embryo does not attach to a person afflicted with disease or in gaol or (gone) to foreign places or during the Parvas although the woman might be in season. He who avoids an old woman, a barren woman, a woman of bad conduct, a woman whose son has died, one whose menstruation time has not approached, a maiden, one who has many sons is free from sin." Bhrunahatya is the destruction or killing of embryo.

As mentioned before she (the wife) who being free from old age and other defects has to be approached in due season and she who being of old age has not to be approached—all these have to be properly maintained:—ED.]

And every wife should be properly maintained. And thus Manu says[4] :—" These (women) should be honored and adorned by (their) fathers, brothers, husbands and husbands' brothers, who desire high prosperity. Where women are honored, there the gods are pleased. But where they are not honored, there, all rites are useless. Where female relations are in grief, that family soon perishes, but that (family) where they are not unhappy, ever prospers. The houses
[*645] *on which, female relations, being unhonored, pronounce curses, perish completely as if destroyed by magic. Hence they should be always honored by persons who wish to prosper, with ornaments, cloths and food during entertainments and festivals. In the family

1. Udita Homa, i.e., a sacrifice which should be performed after sunrise.

2. Anudita Homa, i.e. a sacrifice which should be performed before sunrise.

3. Manu V, S. 66. 4. Ch. III, S. 55 to 60 : S. B. E. Vol. 25, pp. 85, 86.

in which the husband is pleased with his wife, and the wife with the husband, happiness will surely be lasting."

The injunction that they should be honored applies to women other than those who have misconducted themselves.

But to a woman who has misconducted herself, food barely sufficient to keep up life (should be given). Thus *Yajnavalkya* says[1]: " He shall allow an adulterous wife to dwell (in his house) deprived of power, squalid, getting a bare sustenance, disgraced and lying on the ground."

As a virtuous wife (who has not been superseded) should be maintained, even so should one who has been superseded. And this the same (author) says[2]: " Even a superseded wife must be maintained; or, great sin will result." '*Supersession*' (is) taking another wife. The same (author) mentions the causes of supersession[3]: " A woman who is a drunkard, diseased, knavish, barren, wasteful, given to disagreeable speech, or bringing forth only female children should be superseded; so also she who hates her husband." Drunkard, means, one drinking intoxicating liquors. In the (case of) drinking spirituous liquors, not supersession merely, but abandonment also (should be made), in consequence of the statement[4] " and also for a great sin " as a reason for abandonment, and by reason of the text[5] " half his body goes to perdition whose wife drinks spirituous liquors." Hence Manu says[6]:—" Let her be superseded who drinks spirituous liquors, is of bad conduct, rebellious (or cross), diseased, mischievous, or always wasteful." Diseased, *i.e.*, afflicted with a chronic disease. Also in *Brâhma Purana* (it is said) : " To maintain virtuous conduct, one should discard a wife who obstructs virtuous acts, is unchaste, is very sickly,[7] so also one who speaks disagreeably." One should discard,[8] *i.e.*, should supersede her; and one should not, however, give up enjoyment (of her)."

The different times for supersession are pointed out by Manu[9]: A barren woman should be superseded in the eighth year, she, *whose children are (all) dead, in the tenth, she who bears only female children in the eleventh, but she who speaks disagreeably, immediately." He himself states a special rule in (the case of) one who is sick[10]: " But a sick wife who is devoted and endowed with [*646]

1. Ch. I. S. 70. 2. Ch. I. S. 74. 3. Ch. I. S. 73.

4. Ch. I. S. 72. 5. Vasishta, Ch. XXI. S. 15.

6. Ch. IX. S. 80 : S. B. E. Vol. 25, pp. 341, 342.

7. Another reading is अतिकोपिनीम्, *i.e.*, who is very cross or angry.

8. The reading नत्यजेत् is not in accordance with the text.

9. Ch. IX. S. 81 : S. B. E. 25, p. 342. 10. Ch. IX. S. 82 : S. B. E. 25, p. 342

a virtuous nature, should be superseded only with her consent and should never be disgraced."

Supersession is of two kinds, *i.e.*, for religious rites and for love. Of these, with reference to supersession for virtuous acts such as begetting children, the before-mentioned (cases of) "who drinks spirituous liquors, &c.," are efficient causes. But where it is for love they are not requisite: but the prior married wife should be gratified. And so in another Smriti it is said: "He who passes over a woman, and wishes to take another for the sake of pleasure, should marry another after satisfying the prior wife with wealth, being able (to do so)." If he does not gratify her of his own accord, then the king shall make him give the money to her to satisfy her. This *Yajnavalkya* says[1]—"Forsaking an obedient, clever and sweet-speaking wife, the mother of brave sons, a man should be made to give a third share to her and if he has no property to maintain her," *i.e.*, in (the case of) one possessing wealth, gift of a third share, and in (that of) one without wealth, maintenance with food, clothing and others. Manu says, with reference to her who leaves the house, being dissatisfied with the aforesaid money (so given to her) or for any other reason: "The woman who being superseded, departs from the house in anger, should be immediately confined, or cast off in the presence of the family." Casting off, is sending her to her paternal home. With reference to the statement[3] "they should be honored and adorned." Manu gives[4] the mode of honoring to be adopted by one who has many wives—"If the twice-born wed women of their own (caste) and of other (castes) the seniority, and the honor (to be paid to them) in his house, shall be in the order of the castes. Only the wife of the same caste shall personally attend her husband and assist him in his daily religious rites; but by no means the wife of a different caste." *Yajnavalkya* determines[5] who among many wives should co-operate in religious rites—"While there is a wife of the same
[*647] caste, one should not get another to perform (with him) *religious rites, and, among those of the same caste, no other wife than the eldest, should be employed in religious rites." One should co-operate in religious rites only with the wife of the same caste, but not with one of a different caste. But it can be inferred that, if a wife of the same caste is not available, he shall co-operate in religious rites, even with one not of the same caste. But it should not be said, that, if so, co-operation in religious rites may

1. Ch. I, S. 76.
2. Ch. IX, S. 83: S. B. E. 25, p. 342.
3. Ch. III, S. 55: S. B. E. 25, p. 85.
4. Ch. IX, S. 85, 86: S.B.E. 25, p. 342.
5. Ch. I, S. 88.

occur, even with a Sudra wife; for it is forbidden by *Vasishta's* text[1] "she of the black colour is only for pleasure but not for religious rites." When there are several wives of the same caste the middle wife and the youngest wife should not be employed in religious rites without the eldest wife; but the juniors should be directed by the senior. And so *Bodhayana* says:—"He should tie each wife[2]; he should cause each to see the *Gârhapatya* fire; he should make each look at the ghee, &c." *Katyayana* says[3]:— "The kindling of the sacred fire should not be done by the twice-born without the co-operation of any of the wives. That (rite) should be understood as not performed in which all (the wives) have not joined." Because all don't join it, the rite though performed by one is considered as not performed. Some persons interpret differently the text[4] "no other than the eldest," thus, that only the eldest wife co-operates in religious rites but no others. And on this point they quote the text of *Vishnu*—"In *Agnihotra* and other sacrifices the second wife shall not co-operate, otherwise, no benefit accrues to him even from a hundred sacrifices well performed." No regard should be paid to this interpretation, by reason of its conflict with the texts of *Bodhayana* and *Katyayana*. *Vishnu's* text applies to the second wife who is not of the same caste or to a wife married by one while the sacred fires are being maintained. If the fires are lost and are kindled again as she too would be a person (entitled) to perform the rites, she is empowered to co-operate in *Agnihotra*, &c. *Katyayana* states a special rule in respect of this[5]—"A man who has several wives should cause services to the *Agnihotra*, &c., to be performed by the wife of the same caste; when there are many such, by the eldest if not blameworthy; of these he should employ in this matter her who has given birth to heroic sons, who is obedient, is clever, speaks agreeably or is pure. Or in case of inability, the* work should be caused [*648] to be performed in accordance with the Shastra by turns of a day each, in due order of seniority, or in case of inability it should be caused to be performed (in accordance with the Shastra) jointly or by division of work, according to intelligence[6]" If the eldest is not blameable he should get it done by her; if she is blameable, by the junior who has given birth to heroic sons. If there are several who have borne heroic sons, he should employ her among them, who has the qualities of ability to carry out orders, &c. If one wife is incapable of doing it every day, he should employ them by turns in order of seniority. If one wife is unable to do all the

1. Ch. XVIII, S. 18, S. B. E. 14, p. 96. 2. The ceremony of girding a wife.
3. Ch. VIII, S. 5: Dutt, p. 372. 4. Yajnavalkya, Ch. I, S. 38: Dutt, p. 16.
5. Ch. XIX, S. 3-5: Dutt, p. 398 & 399. 6.

work in any day, then all should do it by sharing according to intelligence. As to the statement of *Katyāyana* himself, " the first is the wife who co-operates in religious rites and the second is to add to his sexual pleasure; in her case the benefit is merely temporal, but no spiritual benefit accrues," it has the same meaning as *Vishnu's* text.

Thus has marriage been treated of in detail.

C. C.

CRITICAL NOTES.

Chandu *v.* Kunhamed, I.L.R., 14 M. 324, & 1 M.L.J. 529. *Res judicata. The scope of Explanation* 5 *to S.* 13 *of the Code of Civil Precedure.* In this case, *Collins, C. J.,* and *Handley, J.,* applied explanation 5 to S. 13 C. P. C. in a way that we consider is not likely to commend itself to the profession and is inconsistent with several prior decisions of the Madras High Court itself as well as of other courts. [The case itself has been overruled by a Full Bench of the Madras High Court in the recent case of *Somasundara* v. *Kulandaivelu*[1]:—ED.].

As the question decided is one of frequent occurrence, we shall examine it with some minuteness. Very briefly stated, the facts are as follows:—A suit had been brought by certain Mahomedans for their shares of the estate of a deceased Mahomedan against two other sharers, who were alleged to be in possession. One of these did not appear, and the other contended *inter alia* that a particular item of the plaint properties did not belong to the deceased, but to himself, he having inherited it from his mother. This contention was disallowed, and the plaintiffs got a decree for their share of it. Subsequently the defendant who did not appear in the suit, executed a mortgage of his share in the disputed item to one X. X now sued his mortgagor and the person who had claimed the property as his own in the prior suit. The mortgagor did not put in an appearance in this suit also. But the other defendant No. 2 repeated his contention in the prior suit that the property was his own. The learned judges held that his right to the property was [*649] **res judicata* under Explanation 5 to S. 13 C.P.C. They said: " But the contest in that suit as to this particular paramba was between the plaintiffs in that suit, asserting that it was property in which they and the present defendant No. 1 (*i.e.,* the mortgagor) and their other co-sharers were entitled to share, and present defendant No. 2 denying the same, and claiming it as his own property, and therefore present defendant No. 1 and the other

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1. (1904) I.L.R. 28 M. 457.

co-sharers may be said to claim under the plaintiffs in that suit by explanation 5 of S. 13 C.P.C. We think, therefore, the decision in that suit adverse to the second defendant's title is *res judicata* and conclusive against him in this suit." Now let us look at the words of explanation 5 of S. 13 somewhat carefully. "Where persons litigate *bona fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall for the purposes of this section be deemed to claim under the persons so litigating." The explanation requires that three conditions should exist before the decision in a litigation conducted by one or more persons with respect to any right can bar others from litigating again with respect to the same right. (1) The right must be claimed by the persons litigating in common for themselves and others entitled to the right. This condition to our mind clearly involves that the litigation must be *conducted on behalf of all.* It is not enough if the plaintiffs, saying they and others are entitled to a certain right, professedly conduct the litigation only on their own behalf. We may draw also the following corrollary from this condition, viz., that the right litigated about must be *a joint right* vesting in the plaintiffs and others together, and not an individual right similar to other individual rights vesting in others, because otherwise the plaintiffs cannot be said to litigate in respect of *a* private right claimed in common for themselves and others. (2) The right claimed must be a private right. (3) The litigation must be conducted *bona fide* on behalf of all. We may add a fourth condition derived from approved interpretation of the clause, though not from its words, viz., that the persons so litigating on behalf of themselves and others must obtain permission of the court to do so, and conform to the other conditions laid down in S. 30 C.P.C. We shall return to this presently, after examining whether the case under notice fell within the other requirements of the explanation. We may assume that if the first and second conditions are satisfied, the third, *i.e.*, that the litigation should have been conducted *bona fide* by the plaintiffs in the previous suit was also satisfied. Now did the two former conditions exist in the case ? It seems difficult to answer the question except in the negative. The *prior suit by the plaintiffs therein was for their own share in the property, and not for the shares of themselves and others entitled to a share in the property by virtue of their relationship to the deceased owner; and that being so, they *did* not, and they *could* not, litigate or *profess* to litigate on bahalf of the sharer, who mortgaged his share to X; secondly, the right claimed was not a joint right. Each of [*650]

the persons entitled to a share of the estate of the deceased, possessed a distinct and individual right to his share. He could enforce it without the conjunction of the others. The fact is that except in the case of a joint right, it is unintellegible to speak of some persons litigating on behalf of themselves and others. It is no doubt true that the contention of the second defendant would affect in the same manner the rights both of the plaintiffs in the prior suit, and of X's mortgagor. But this is not enough to create the privity required by explanation 5 of S. 13. Suppose the second defendant, instead of failing, had succeeded in his contention that the property was his own, and X's mortgagor, instead of being a defendant and absent in the suit had not been made a party to the prior suit at all, (for, this according to the view of the learned judges will not affect the matter at all), could it be said, that notwithstanding that the plaintiffs sued for their own shares only, and did not pretend to enforce the rights of other heirs of the deceased owner, the decision against them would deprive the other heirs also of their right to a share in the property, simply because a right to *some* share of the property was in fact common to them and others, and they said so in the litigation ?

[According to the principle enunciated by the Full Bench of the Madras High Court in the recent case of *Somasundara* v. *Kulandaivelu*[1] a right to relief can be said to be claimed in common under Explanation V to S. 13 C.P.C. only as between parties who would be benefited by such relief if granted and who have such an interest in the relief claimed that they could join as co-plaintiffs under S. 26 C.P.C. Again a suit cannot be maintained by a person on behalf of himself and others standing in the same relation with him in the subject of the action, unless the relief sought by him is beneficial to those whom he seeks to represent and such others are necessarily interested in the relief sought: Ed:—]

In a case which resembles the one under notice in some measure, the Calcutta High Court held a different view from that (taken in the Madras case under notice.) In *Hazir Gazi* v. *Sona monee Dassee*,[2] the plaintiffs sued two brothers for about ten bighas of lands, of which they said, they were dispossessed by the defendants. The plaintiffs' title was based on a lease by the prior owners of the land, whose rights had been purchased by the defendants in the name of one of them. The plaintiffs had already instituted a suit against the defendants in whose name the purchase stood for two bighas (not included, in the present suit), of which they had been dispossessed by him; and they had obtained a decree

1. (1904) I.L.R. 28 M. 57 (F.B.) 2. (1880) I.L.R. 6 C. 31.

againt him. The defendant therein had contended that the patta relied on by the plaintiffs was fraudulent and not binding on him, but the issue was decided in the plaintiffs' favour. In the second suit the validity of the patta was again questioned by the defendant. The plaintiffs contended that the question was *res judicata* under explanation 5 of S. 13 as the claim of the defendants in both the cases was based on the same title. *Jackson* and *Tottenham, J.J.*, overruled the contention. They were not prepared to say that the explanation* has this meaning, that a judgment obtained against a co- [*651] sharer in the property is binding against another co-sharer in the property and clearly it would not be so, when the first suit did not purport to have been litigated in respect of a right claimed in common by two persons. The distinction between a joint right claimed by some persons on behalf of themselves and others, and an individual right of the same kind possessed by a number of persons is clearly pointed out also in *Kali Shunker Doss* v. *Gopal Chunder Dutt* [1] *Thackersey Dewraj* v. *Hurbhum Nursey* [2] and in *Thanakoti* v. *Muniappa* .[3] It may not be out of place here to notice a few other decisions bearing on the true scope and intention of explanation 5 of S. 13. Sections 26 and 28 of the code lay down the rule that all persons may be joined as plaintiffs or defendants in or against whom respectively the right to any relief claimed is alleged to exist. *K. P. Kanna Pisharody* v. *V. M. Narayanan Somayajipad.*[4] S. 30 C. P. C. makes provisions for suits being instituted or defended by one or more parties where there are numerous persons having the same interest in one suit. Are we then to understand that except when the provisions of S. 30 apply and are availed of, all the persons interested must be parties to a suit ? If so, explanation 5 to S. 13 can apply only to cases covered [5] by S. 30, and if such be the case, S. 30 cannot apply to *public* rights, because explanation 5 to S. 13 refers only to cases where one or more litigate respecting a *private* right on behalf of themselves and others. Let us see how the decisions on the question stand. The question was considered at some length in *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi.*[6] There in a suit against the Karnavan of a Nambudiri family, a decree was made that the defendant had only a mortgage right over certain lands. The junior members of the family instituted a suit for a declaration that the decree was not binding on

1. (1880) I. L. R. 6 C 49. 2. (1884) I. L. R. 8 B 432.

3. (1885) I. L. R. 8 M 496. 4. (1881) I. L. R. 3 M 234.

5. This point was not expressly decided in the case of *Somasundara* v. *Kulandaivelu* (1904) I. L. R. 28 M 457 :—ED.]

6. (1880) I. L. R. 2 M 328.

the family, and the question was, whether the decision in the prior suit was *res judicata* as between the parties to the subsequent suit. The High Court (*Kernan* and *Forbes, JJ.*) held it was. They held that " in the prior suit, the Karnavan defended not only on his own behalf, but on behalf of the rest of the members of the tarwad, who were therefore (within explanation 5 to S. 13) deemed to claim *under* him. Explanation 5 is not limited in its language to a suit under S. 30..............Such suits may embrace claims or rights of a *public* nature, whereas explanation 5 is confined to *private* rights..............S. 30 though it may apply to the case of a Karnavan suing or defending his own interest joint with and inseparable from, the rest of the tarwad, when the members may in an unusual case happen to be very numerous, is not applicable in [*652] ordinary cases, where the members are not* numerous, being as in this case only 12." The decision proceeded partly also on the ground that the junior members, had, as a fact, actively helped the Karnavans in defending the prior suit. The decision in this case has not received the approval of the Madras High Court in subsequent cases. It was departed from by *Innes* and *Kernan, JJ.* in *Vasudeva* v. *Narayana*[1]. *Innes, J.* referred to Ss. 28 to 30 and observed that except in cases expressly excepted by the provisions of the code all the persons interested in a suit must be parties. He also held that explanation 5 to S. 13 refers only to *bona fide* claims, (meaning claims by plaintiffs), and not *bona fide* defences, and *Kernan, J.*, adopted the distinction. The distinction made between *claims* and *defences* is probably not correct. There seems to be nothing in the word *claim* to refer it to the rights put forward by a plaintiff rather than to those put forward by a defendant. It seems to us to be equally applicable to rights urged by a plaintiff or a defendant. But although this distinction may not be sound, the proposition that except in the cases specially provided for, all persons interested must be parties has been subsequently affirmed by the court, and had already been laid down in *Kombi* v. *Lakshmi*,[2]. In *Gopalan* v. *Valia Tamburatti*,[3] *Turner C.J.* and *Kernan J.* observed that notwithstanding the practice in Malabar of the Karnavan suing and being sued as representative of the whole tarwad, (now that the C. P. C. S. 30 contains a special provision to obviate the inconvenience, it may be doubted how far the practice would be now upheld), it is advisable that resort should be had to the provisions of S. 30 C. P. C. In *Thanakoti* v. *Muniappa*[4] *Kernan*, and *Hutchins, J.J.* distinctly

1. (1882) I.L.R. 6 M. 121.
2. (1882) I.L.R. 5 M. 201.
3. (1883) I.L.R. 7 M. 37.
4. (1885) I.L.R. 8 M. 496.

laid down that "explanation 5 (to Section 13) must be read with the provisions of S. 30, and the principles to be found in that section. In *Ittiachan* v. *Vellappan* [1] the Full Bench of the Madras High Court held that explanation 5 cannot be availed of to make a decree against a Karnavan binding on the tarwad and that resort should be had to S. 30 when it is desired to bind the whole family, but made some concessions on account of the loose practice existing in Malabar for a long time. Explanation 5 was applied in *Madhavan* v. *Keshavan*,[2] to a case where one of five trustees, who had not been made a party to a suit by another trustee for the recovery of trust property alienated by some of the trustees alone, sued to set aside the alienation and recover the properties on behalf of the trust. *Kernan* and *Parker, JJ.* held that as the suit had been conducted *bona fide* by the other trustees in the prior suit, explanation 5 applied. The decision* proceeded to a large extent on the ground that the trusteeship of the plaintiff in the subsequent suit had not been recognized at the time of the prior suit, and he could not therefore be made a party to that suit. [*653]

So far then as the decisions go, explanation 5 to S. 13 is applicable only to cases coming within the purview of S. 30. If so, as we have already pointed out, S. 30 must also be limited to *private rights* and cannot apply to public rights. The term private comprehends probably a class—definite consisting of a large number of persons, such as the inhabitants of a village or parish, but excludes public rights strictly so called, such as a right of way, right of fishing belonging to all the public. S. 30 will therefore apply to the former class of cases. We have seen that in *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi* [3] the learned judges held that S. 30 applies also to strictly public rights. But this opinion has been subsequently dissented from. In *Adamson* v. *Arumugam*,[4] *Collins, C.J.* and *Parker, J.* held that it would not apply to suits to enforce a public right of way. The learned judges observed, "That section is rather designed to allow one or more persons to represent a class having special interests than to allow such persons to sue on behalf of the general public to which the notices prescribed by that procedure would be inapplicable." The same view was enunciated by a Full Bench of the Calcutta High Court in *Chuni Lall* v. *Ramkishen Sahu*.[5] The same rule applies in English law. There can be no *res judicata* there on account of any rule of the kind embodied in explanation 5

1. (1885) I.L.R. 8 M. 484.
2. (1887.) I.L.R. 11 M. 191.
3. (1880) I.L.R. 2 M. 328.
4. (1886) I.L.R. 9 M. 463.
5. (1888) I.L.R. 15 C. 460.

to S. 13 C.P.C. except in cases falling within the principle of S. 30, (Judicature Order XVI. Rule 9) and there also, the rule corresponding to S. 30 does not apply to public rights. See cases under Rule 9, Order XVI, Wilson's Judicature Act, pp. 175, 176; Daniel's Chancery Practice, Vol. 1, Ch. IV. What then is the procedure to be adopted for enforcing public rights? It is impossible to discuss this subject within the limits of this note. An individual cannot, of course, himself institute a suit in a Civil Court for the infraction of a public right unless he has sustained some special damage. But is there any means of enforcing public rights where no specific provision has been made by the legislature as in the case of charitable and religious trusts by S. 539? In this note we can only refer to the cases of *Chuni Lall* v. *Ramkishen Sahu*,[1] *Nilkanthapa Malkapa* v. *The Magistrate in charge of the Sholapur Taluka*,[2] *Balaram Chatrukalal* v. *The Magistrate in charge of Taluka Igatpuri*.[3] We shall probably return to the question in a subsequent number of the journal.

[Upon the question whether S. 30 applies to public rights, see the cases discussed by *Woodroffe J.* in *Monmotho Nath Das* v. *Harischundra Das*.[4] If there is an infringement of a public right, the substantive law will give a plaintiff no remedy unless he suffers special injury. S. 30 C.P.C. can only be availed of where the substantive law allows a suit. But if it is a right of a defined class of the public, S. 30 has always been availed of. Even as regards public rights the new C.P.C. now gives a remedy under certain circumstances. See S. 91 of Act V of 1908:—ED.]

[*690]

*NOTES OF INDIAN CASES.

Bagal Chunder Mookerjee *v.* **Rameshur Mundul**, I.L.R. 18 C. 496. The Calcutta High Court does not agree with the Allahabad High Court in holding that a sale held without a fresh proclamation after it has been adjourned is absolutely void, and not a mere irregularity, which will be material, only when the judgment-debtor or judgment-creditor is injured thereby. The judges (*Tottenham* and *Trevelyan, J.J.*) rely on a previous ruling in *Satish Chunder Rai Chowdhuri* v. *Thomas*.[5] They would seem to be of opinion that the same rule would apply to the case of a sale without any proclamation at all under S. 290, C.P.C., although they did not expressly dissent from the Allahabad rulings in *Bakshi*

1. (1888) I.L.R. 15 C. 460.
2. (1880) I.L.R. 6 B. 670.
3. (1906) I.L.R. 33 C. 905.
4. (1882) I.L.R. 6 B. 672.
5. (1885) I.L.R. 11 C. 658.

Nand Kishore v. *Malak Chand*,[1] *Ganga Prasad* v. *Jag Lal Rai*,[2] and other cases. The decision of the Calcutta High Court is in accordance with *Nana Kumar Roy* v. *Golam Chunder Dey*,[3] *Venkata* v. *Sama*,[4] and *Lakshmi* v. *Krishna Bhat*,[5]; so that the Allahabad High Court is now alone in holding that a proclamation is an essential preliminary to a court sale, the absence of which will invalidate it. The Privy Council lately held that, where an immovable* property has been attached in execution for an earlier instalment of a debt, a sale for the earlier and a later instalment will be valid without a fresh attachment. Their Lordships seem therefore inclined to hold that even attachment is not essential to a court sale, *Dosibai* v. *Ishwardas Jagjiwandas*[6]. The object of attachment is to secure the property for the judgment-creditor's debt, so as to prevent the judgment-debtor from alienating, and is not intended for the benefit of the judgment-debtor. A proclamation of sale is no doubt a matter affecting the judgment-debtor also, and he may therefore set aside the sale, if he is injured by the absence of proclamation or by its being irregularly made, but there seems no reason to hold that a proper proclamation is a pre-requisite for a valid sale. Sale by individuals or corporations and perhaps even by the executive Government under statutory authority will stand on a different footing, because with reference to them the rule is that a power conferred by a statute must be exercised in strict confirmity with the rules laid down by the statute. [*691]

It is worth noting that in the case under notice, the Calcutta judges apparently agreed with the view enunciated by *Edge C. J.* in *Rameshur Singh* v. *Sheodin Singh*[7] that there is a difference in the construction to be placed on imperative provisions of statutes in the positive and in the negative form, and that a disobedience of a positive provision, though it may be imperative in its terms, may be only an irregularity, but an act done in contravention of an imperative prohibitive provision is an absolute illegality. We are not sure that the distinction is quite sound. The authority relied on by *Edge C. J.*[8] from Leake on Contracts evidently does not support it.

[*Note*:—Upon the question that a sale cannot be set aside under S. 311 without profit and loss it has been pointed out that the decision of the Allahabad High Court in *Bakshi Nund Kishore* v. *Malak Chand Ganga Prasad* v. *Jag Lal Ra* and others were

1. (1885) I.L.R. 7. A 289.
2. (1889) I.L.R. 11 A. 333.
3. (1891) I.L.R. 18 C. 422.
4. (1890) I.L.R. 14 M. 227.
5. (1884) I.L.R. 8 B. 424.
6. (1891) L.R. 18 I.A. 22.
7. (1889) I.L.R. 12 A. 510.
8. (1889) I.L.R. 12 A. 510 at p. 517.

decided before the Privy Council decision in *Tasaddk Rasul Khan* v. *Ahmad Husain*[1] which ruled non compliance with the provisions of S. 290 did not make the sale a nullity, that although such non-compliance was a material irregularity sale could not be set aside without proof of substantial injury having resulted thereby and that after that decision of the P C. the earlier decision above pointed out could no longer be regarded as sound. See *Harban Lal* v. *Kundan Lal*.[2] The recent decision of the Judicial Committee also supports this view. See *Gajrajmati Korain* v. *Akbar Husain*.[3] The Calcutta case under notice must, therefore, be regarded as laying down the correct law which has to be applied by all the High Courts. Order XXI, S. 90 is based upon this view—ED.].

Queen Empress v. Nayamuddin, I.L.R., 18 C., 484. In this case the scope of Exception 5 to S. 300, of the Indian Penal Code was considered, and it was held that the fact that homicide was committed, in the course of a premeditated fight between parties armed with deadly weapons, will not reduce the offence to culpable homicide not amounting to murder. We think there can hardly be any doubt that the decision is right and that the previous case of *Shamshere Khan* v. *The Empress*[4] went a little too far. It ignored the distinction between a person suffering death or taking the risk of death, with his *consent*, and his being *aware* that as the consequence of a fight he may suffer death. See *Empress* v. *Rohimuddin*[5]. The exception relates only to the former class of cases. We are not sure that *Justices O'Kenealy* and *Ghose* keep the distinction clearly in view in the case under notice. At the same time we think that *Pigot, J.* is not quite right in observing that the exception does not refer to "anything short of suffering the infliction of death, or running the risk of having death inflicted, under some definite circumstances not merely of time but of mode of inflicting it specifically consented to,' and that it does not contemplate a consent to the acts of persons not known or ascertained at the time of the consent being given." Suppose a person consents with a number of persons that any one of them may kill him or *employ any person to kill him, will not this case fall within the
[*692] exception? The real question in all these cases is, whether there was consent to suffer death or take the risk of it, and not merely a knowledge of the probability of death being suffered.

1. (1893) I.L.R. 21 C. 66: L.R. 20 I.A. 176.
2. (1898) I.L.R. 21 A. 140 (142).
3. (1906) I.L.R. 29 A. 196 (202).
4. (1880) I.L.R. 6 C. 154.
5. (1879) I.L.R. 5 C. 31.

Rajendra Narain Bagchi v. Watson & Co., I.L.R., 18 C. 510. In this case *Justices Prinsep* and *Banerjee* laid down two propositions, both of which seem to be questionable. The first is that a debtor who has received from his creditor notice of the assignment of the debt to a third person cannot dispute such third person's right to sue for the recovery of the debt. The objection raised in the case was that the assignee took his assignment on behalf of, and as a member of, an undivided family. It was disallowed, the judges observing that the case of the ostensible transferee of a debt after the transfer is notified to the debtor, is an exception to the rule that no one can enforce a claim by suit, if he is not beneficially interested in the subject matter thereof, and the reason is said to be that a debtor is bound to pay the debt to whomsoever the creditor has directed him to pay it; S. 133, of Act 4 of 1882 no doubt says that the debtor *shall* give effect to the transfer when he receives such notice, but reading it with Ss. 131 and 132, it seems to us that the real object of the section is merely to protect the debtor in cases where he may have acted without notice of the assignment and to make him *prima facie* liable when such notice has been given. Their lordships say that if there are other people interested in the assignment, they ought to protect themselves by making the creditor give notice of their right to the debtor. But suppose he refuses to do so, and the debtor is aware of their rights. It seems to us that according to the decisions in *Lala Jugdeo Sahai* v. *Brij Behari Lal*,[1] *Subbammal* v. *Venkatarama*,[2] and *Kalka Prasad* v. *Chandan Singh*,[3] he is bound to recognise their rights; and if that be so, he would be entitled to contend that the plaintiff is not solely entitled to recover, nor does it appear to us that there are any valid reasons for making the case of debts transferred an exception to the ordinary rules of procedure.

The second proposition laid down is that where a debtor disputes the right of the assignee to recover at all, he cannot claim the benefit of S. 135 of the Transfer of Property Act. Their lordships agree with the decisions of the Madras High Court in *Subbammal* v. *Venkatarama*[2] and of the Calcutta High Court in *Grish Chandra* v. *Kashisauri Debi*[4] and *Khoshdeb Biswas* v. *Satar Mondol*[5] and dissent from the Allahabad ruling in *Jani Begam* v. *Jahangir Khan*[6]. But the Madras High Court overruled *Subbammal* v. *Venkatarama*,[2] in *Nilakanta* v. *Krishnasami*[7]. It is not

1. (1886) I.L.R. 12 C. 505.
2. (1887) I.L.R. 10 M. 289.
3. (1887) I.L.R. 10 A. 20.
4. (1886) I.L.R. 13 C. 145.
5. (1888) I.L.R. 15 C. 436.
6. (1887) I.L.R. 9 A. 476.
7. (1890) I.L.R. 13 M. 225.

improbable that the Calcutta High Court would have come to a different conclusion if the later Madras ruling had been brought to their notice.

[As regards the 2nd proposition the Calcutta High Court by a majority (Petheram, C.J. and Norris and Ghose, JJ.) decided in a Full Bench case that the view taken in that Court was correct. *Muchiram Barik* v. *Ishan Chunder*[1] and minority (Prinsep and O'Kinealy JJ.) dissented from this view and held that the decisons in Allahabad and Madras were correct. A mere offer to pay money will do. It is not necessary to deposit the money in Court. *Debendar Nath Mullick* v. *Pulin Behary Mullick.*[2] By the Act of 1905 the whole of S. 135 has been repealed:—ED.

Kishun Lal *v.* **Muhammad Safdar Ali Khan,** I.L.R. 13 A., 383. In this case *Edge C.J.* and *Knox. J.* held following a prior decision in *Munna Singh* v. *Gajadhar Singh*[3] that a pur-
[*693] chaser at an auction* sale, wishing to recover his purchase-money on the ground that the judgment-debtor has been found to have no saleable interest in the property sold, may file a regular suit for the purpose, and is not confined to an application under S. 315 C.P.C. The same view was held by the Madras High Court, in *Pachayappan* v. *Narayana.*[4] The learned judges of the Allahabad High Court, were themselves inclined to think, apart from the authorities on the question, that on the true construction of S. 315, C.P.C., a regular suit would not lie and it must be admitted that the order of reference by *Straight J.* in *Munna Singh* v. *Gajadhar Singh,*[3] contains weighty reason in favour of the latter view, though the learned judge himself came to a different conclusion after the argument before the Full Bench. Under Act VIII of 1859, it was held that a purchaser could not claim a refund of the purchase-money, where the judgment-debtor turned out to have no interest in the property, (See *Sowdamini Chowdhrain* v. *Krishna Kishor Poddar*[5]; *Dorab Ally Khan* v. *Khajah Moheeooddeen,*[6] and the other cases referred to in *Munna Singh* v. *Gajadhar Singh,*[3] because the purchaser bought at his peril, and there was no warranty of title, express or implied, as in the case of private sales. What was the effect of the change introduced by S. 315 in Act X of 1877? It extended to the case of auction purchasers in some degree, a right already possessed by purchasers at private sale, and provided that a refund of the purchase-money may be obtained by an application. The ordinary

1. (1894) I.L.R. 21 C. 568.
2. (1896) I.L.R. 23 C. 713.
3. (1883) I.L.R. 5A. 577.
4. (1887) I.L.R. 11 M. 269.
5. (1869) 4 B.L.R.F.B. 11.
6. (1875) I.L.R. 1 C. 55

rule where a statute creates a new right and prescribes a mode of enforcement of the right is that that mode alone should be adopted in the absence of any indication to the contrary. But will it apply to a case, where a right already possessed by one class of persons is merely extended to another class? Probably not. This conclusion seems to be strengthened by the fact that no appeal is provided against an order under S. 315, which could hardly be the case, if it was intended to be the sole means of enforcing the right given by the first paragraph of the section. The provision in the second paragraph moreover is only enabling in form, "The repayment... ......*may* be enforced, &c."

[*Note*:—The view laid down in this case that a purchaser's remedy is not confined to an application but extends to a suit has been re-affirmed by the Allahabad High Court in *Shanto Chandar Mukerji* v. *Nain Sukh* [1] The same view has been taken in Calcutta. See *Hari Doyal Singh* v. *Sheikh Samsuddin* [2] and *Nityanund Roy* v. *Jaggat Chandra Guba* [3]. Present Code (Rule 93, Order 21) gives on right to apply for refund in the case of a Judgment-debtor having no title. A suit will be maintainable provided under the substantive law a court-purchaser is entitled to refund :—ED.]

Nourang Rai *v.* Latif Chaudhri, I.L.R., 13 A., 394. In this case, *Mahmood J.* reiterated the proposition laid down by the Full Bench of the Allahabad High Court, in *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan,* [4] and *Shohrat Singh* v. *Bridgman* [5] that, whether a decree of the lower court is confirmed or modified by an appellate court, the decree of the latter supersedes the lower court's decree and is the only decree capable of execution. It is worth noting that the Madras High Court, has also recently laid down the same proposition in L.P.A. 30 of 1890, receding from the position taken up by them in *Sundara* v. *Subbanna* [6].

[See the note to *Patloji* v. *Ganu* [7] pp.409-411 ante :—ED.]

Ram Lal Dube *v.* Har Narain, I.L.R., 13 A, 400. The head note in this case is very misleading. The decision of *Mr. Justice Mahmood* is merely to the effect that when the period for redemption fixed in a redemption suit* has elapsed, the fact that the court in execution proceedings received the deposit made by the mortgagor and registered the application for execution could not cure the effect of the lapse of the period. His lordship also observed that the terms of the decree cannot be interfered with by the [*694]

1. (1901) I.L.R. 23 A. 355.
2. (1900) 5 C.W.N. 240.
3. (1902) 7 C.W.N. 105.
4. (1888) I.L.R. 11 A. 267.
5. (1882) I.L.R. 4 A. 376.
6. (1886) I.L.R. 9 M. 354.
7. (1890) I.L.R. 15 B. 370.

court executing the decree. The head note is "A court having framed a decree conditioned on the payment by the plaintiff of a sum certain within a specified time has no power to extend the time for payment after the period mentioned in the decree has elapsed." But *Justice Mahmood* observed only that the court could not extend the time *in execution*. If the head note were correct, the decision would be opposed to the Privy Council decision in *Rajab Ali* v. *Amir Hossein*[1] and that of the Calcutta Court in *Modhusudan Das* v. *Adhikari Prapanna*,[2] followed by the Madras High Court in C.M.P. No. 594 of 1890, as well as to the decision of the Privy Council cited by *Justice Mahmood* himself. [As to extending time mentioned in redemption decree, see the cases cited in our notes to *Patloji* v. *Ganu*[3] p. 410 ante:—ED.]

Raman v. Shathanathan, I.L.R., 14 M, 312. In this case where the question was whether the construction placed on a document in a prior suit between the parties was binding on them as *res judicata*, their lordships held the principle of *res judicata* would not apply, as the construction of a document is a question of law and referred to *Parthasaradi* v. *Chinna Krishna*,[4] in support of their view. The point however was not necessary for the decision in the case as their lordships held the question was not really raised and decided in the prior case.

Queen Empress v. Balasinnatambi, I.L.R. 14 M., 334. It is satisfactory to note that the Madras High Court, overruling its former decision in *Queen Empress* v. *Amir Khan*[5] has expressed its concurrence with the other High Courts in holding that a Sessions Judge is competent under S. 437 of the Criminal Procedure Code to direct further inquiry though there may be no additional evidence to be taken, and the expression further inquiry, means a fresh consideration of the evidence already recorded, as well as the taking of additional evidence.

[See the question considered by a Full Bench in *Narayanasamy Naidu* v. *Emperor*[6]:—ED.]

Queen Empress v. Fischer, I.L.R., 14 M, 342. Crime does not necessarily indicate a mind at fault, because it has been found necessary to forbid absolutely the doing of many acts, and where such is the case, it is no use proving that there was nothing but the most honest intention in the person doing the act. The Madras High Court has now decided that the solemnization of a marriage

1. (1889) I.L.R. 17 C. 1.
2. (1889) I.L.R. 17 C. 516.
3. (1890) I.L.R. 15 B. 370.
4. (1882) I.L.R. 5 M. 304.
5. (1885) I.L.R. 8 M. 336.
6. (1909) I.L.R. 32 M. 220.

between Christians by any unauthorized person in the absence of a Marriage Registrar is such an act (Act XV of 1872, S. 68), notwithstanding that the statute pronounces the solemnizing of such a marriage criminal only if it is done "knowingly."

Michael v. Briggs, I.L.R., 14 M, 362. In this case *Muthusami Aiyar* and *Shephard J.J.* held following two English cases, that a secretary of a nonproprietory club cannot by himself sue a member of the club for the price of goods supplied to him. The secretary is no more entitled to the price than the other members and there is no reason why an exception should be made in his favour to the ordinary rule of Procedure that a suit must be brought* by all the persons entitled to the relief claimed. It would of course be otherwise, where the club is registered as a corporation. [*695]

Thandavan v. Perianna, I.L.R., 14 M, 363. In this case, *Collins C.J.* and *Weir J.* are reported to have decided that the Criminal Procedure Code does not contemplate the exercise of the powers of revision in cases of acquittal. It is doubtful whether their lordships meant to lay down any such proposition because they dismissed the application for revision in the particular case "under the *discretionary* power given in S. 440." We cannot however say that the reporter is not justified in his head note, for, a previous sentence in the judgment supports him. There can be no doubt however that, if the reporter is right, the decision is wrong. It is quite true that the High Court will not likely interfere in cases of revision, but will leave it to the Public Prosecutor to appeal against an acquittal, if so advised, especially because it has no power to convict the accused on revision, but can only order a retrial. But it is against all precedent, see Weir's Criminal Rulings, pp. 1057, 1062 and *In the matter of Aurokiam*,[1] and we submit, against the plain construction of the Code also, to hold that the High Court has no power to interfere by revision in any case of acquittal. See also *Heerabai* v. *Framji Bhikaji*.[2]

SUMMARY OF ENGLISH CASES.

In re J. Thorley. Thorley v. Massam. *In re* R. K. Thorley. Thorley v. Massam, 1891, II Ch. 613.

Bequest of manufactory—Power to trustees to carry on business with son—Payment of £250 annually—Gift on condition—Legacy duty.

A testator bequeathed his manufactory to trustees upon trust to carry on the business in conjunction with his son, and provided

1. (1878) I.L.R. 2 M. 88. 2. (1890) I.L.R. 15 B. 349.

that whilst the trustees carried on the business, each of them should receive annually £250 out of the profits, and whilst the son carried it on in conjunction with them, he should also receive a similar amount. *Held* by the Court of Appeal, (1) following *In re Pooley*[1] that the trustees (like executors) not being entitled to any remuneration for their management, in the absence of the provision in the will, the allowance of £250 a year to them, while they managed, must be treated as a legacy, and liable to legacy duty. It was not a gift for a valuable consideration, but a gift upon a condition, (*Per Bowen L.J.*); (2) that the allowance of £250 to the son was also similarly a gift upon a condition and liable to legacy duty; (3) *Per Kay, L.J*, that the annuities, which were given out of the *profits* of the manufacturing business, were given out of the estate of the testator.

Gedye *v.* Commissioners of Her Majesty's Works and Public Buildings, 1891, II. Ch. 630.

Land Clauses Consolidation Act, 579—Lessee for long term —Compensation only for lease hold and not reversionary interest.

A lessee for a long term of years, who is obliged to give up possession of the land to the Commissioners of Her Majesty's Works and Public Buildings, under the Land Clauses Consolidation Act, before the expiry of his lease, is not entitled to the value of the reversion but only of his leasehold interest, (where no reversioner appears and claims), under S. 79 of the Act, which provides that the parties in possession of the lands, at the time of their being purchased or taken, shall be deemed to be lawfully entitled to the value of any reversionary or other interest paid into Court,*
[*696] unless the contrary is shown. It would be otherwise if the lessee was in possession, and the lease had expired, when it was taken up under the Act.

In re Tredwell. Jeffray *v.* Tredwell, 1891, II Ch. 640.

Construction of will—Words clear—Cases irrelevant—Give effect to language.

In the construction of wills, it is contrary to all sound principles, where the words of the will themselves are clear, to go outside the will into a consideration of cases, in order to raise a question, which does not arise upon the plain construction of the will. Recourse should be had to authorities in order to grapple with a

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3. (1889) 40 Ch. D. 1.

difficulty when it arises, not import into it from them, something which is not in itself, in order to raise a doubt which is then sought to be met by those authorities.

A testator directed the trustees under the will to pay the income of his estates to his widow for life, or until she should marry again, after which she was to get an annuity of £200, and he directed them further, after the death of his widow to pay certain legacies, which were to vest in the legatees on his own death, although payment was postponed until the death of his widow. The widow having married again, the legatees claimed payment at once. *Held*, reversing the decision of *North J.*, that the legacies could not be claimed until after the death of the widow, and were not payable on her re-marriage, the words of the will on this point being quite clear.

In re **Radcliffe. Radcliffe** *v.* **Bewes,** 1891, II Ch. 662.

Tenant for life—Marriage settlement—Power of appointment, release of—Equal shares to children in default of appointment—Father's right to moiety of funds when son should die after 21.

A father who was tenant for life had power to appoint the funds of his marriage settlement among his children, and in default of appointment, the funds were to be held by the trustees in trust for the children in equal shares, the shares to vest at twenty-one or on marriage. One out of the three children died in infancy, and another died a batchelor after attaining twenty-one, and the father took out administration to his estate. The father executed a deed of release of his power and called upon the trustees of the settlement to transfer to him a moiety of the trust funds. *Held* by *North J.* that although the release was valid, he was not on the authorities entitled to half of the funds, although on principle there was no reason why he should not be.

In re **Brace. Welch** *v.* **Colt,** 1891, II Ch. 671.

Power of appointment, exercise of, by deed—Devise of property, no revocation.

When there has been a complete exercise of a power of appointment by means of a deed, reversing a power of revocation and new appointment, although no express words are necessary to effect a revocation, a mere devise of real estate (including the property, the subject of appointment) without more, will not amount to such revocation.

Smith v. Andrews, 1891, II Ch 678.

Public right of navigation over river—No right to fish—Evidence.

(1) The right of navigation over a river does not imply a right to fish, where it is not subject to the action of the tides. (2) The public cannot have any right to fish in a river by custom or prescription. (3) It being incapable of being acquired by prescription there can be no presumption of a lost grant. (4) Where the property in the bed of the soil vests in a private owner, very strong evidence will be required to show that any fishing carried on by the
[*697] public was in the assertion* of an adverse right and not by sufferance. (5) Entries of the names of tenants in parish rate—books are admissible in evidence to prove the lessor's title to the fishery.

Walter v. Everard, 1891, II Q. B. 369.

Master and apprentice—apprentice infant—Deed by which premium is payable—Right of master to recover—Liability of infant to pay for teaching or instruction.

In an action by a master against an apprentice for the recovery of the premium payable by the latter under a deed of apprenticeship executed during infancy, *held,* if the deed was a provident and proper arrangement for the infant and necessary for his learning the business to which he was apprenticed and the premium was fair and reasonable, that the infant was liable under the deed as it was for necessary instruction, in the same way as he would be upon a covenant by deed for the price of necessaries. *Per Lord Esher,* M. R., education in a trade with a view to making an infant a useful citizen must be considered a necessary for an infant. *Per Lord Esher,* M. R., and *Fry,* L. J., it should not be said that literary instruction likely to lead to the infant's success in a learned profession is not within the observations of Lord Coke about an infant's liability to pay for his teaching or instruction.

London Bank of Mexico and South America v. Apthorpe, 1891, II Q. B. 378.

Banking Company—Business carried on in England—Part profits earned out of transactions abroad—Income-tax.

Where part of the profits of a business carried on in England is earned by means of transactions abroad, it is not carrying on the business abroad. And when the transactions are carried on

subject to the directions and at the will and pleasure of the masters and owners resident in London, of that business, the banking company are assessable in England on the profits of that business carried on in England, and the assessment need not be delayed until the money, the profit of the transaction performed abroad, comes to England.

Spurling *v.* Bantoft, 1891, II. Q. B. 384.

Landlord and Tenant—Lease by corporation—Lessee cattle salesman—Premises demised used for sale of cattle—Covenant for quiet enjoyment—Establishment by corporation of cattle market—Sale by lessee outside market illegal—Covenant invalid.

The appellant, a cattle salesman, occupied premises which he used for the sale of cattle, under leases granted by a corporation, containing covenants for quiet enjoyment. Afterwards, the corporation as the urban authority, established a cattle market. Upon a conviction of the appellant for selling cattle in his sale-yard without paying toll and outside the market limits, *held* that the corporation had not derogated from their grant, that the power having been given to them for the public benefit they were not at liberty to enter into any covenant to do something which might conflict with the public benefit, and that the conviction was therefore right.

Smith *v.* Gronow, 1891, II. Q. B. 394.

Landlord and Tenant—Lease for term—Re-entry on bankruptcy of lessee or assigns—Assignment by lessee—Bankruptcy of lessee—No forfeiture—Construction.

In a lease for a term there was a proviso for re-entry on the bankruptcy of the lessee or his assigns. The lessee having become bankrupt subsequent to the assignment of the lease, *held* that the proviso for re-entry referred only to the bankruptcy of the person who for the time being was possessed of the term and that consequently no forfeiture had been incurred. *Per Wright* J., the only right of the lessor which was endangered by the original lessee's bankruptcy after the assignment had taken place, being his right to enforce against the original lessee his contractual liability under his express covenants, the power of re-entry in aid of that right, after assignment made, was* more than the subject-matter required and [*698]
more than ought to be understood in the absence of any words expressing an intention to apply that remedy for the protection of

merely personal rights against a stranger to the term. *Semble:* the bringing of this action being an election made and a notification to the assignee of the lessor's intention to re-enter, the annulment of the bankruptcy cannot defeat that election.

Alldred *v.* West Metropolitan Trams Co., 1891, II. Q. B. 398.

Tramway Company—Duty to repair road—Statutory delegation of duty to road-authority—Negligence of road-authority —Liability of Tramway Company.

Where a Tramway Company had delegated under statutory authority, its duty to repair a road, to the road authorities, the Tramway Company is not liable for injuries occasioned through non-repair of the road to a person using the same, as they had no power to force the road authorities to do anything which they might think ought to be done, or not to do anything which they might think ought not to be done.

Smith *v.* Bailey, 1891, II. Q. B. 403.

Highway—Hire of engine—Negligence of hirer—Personal injury to plaintiff—Owner of engine not liable.

Through the negligent management of the defendant's engine while it was being used upon a highway by the hirer, personal injuries were occasioned to the plaintiff who was being driven in a carriage upon the highway. *Held* that the owner was not liable in respect of such injuries though his name and address were affixed to the engine as required by S. 7 of 28 and 29 Vic. Ch. 83.

Coupe Co. *v.* Maddick, 1891, II. Q. B. 413.

Contract of hiring—Hire of horse and carriage—Driver's negligence—Liability of hirer to owner—Theft of hired goods—Hirer not liable to owner.

The hirer of a horse and carriage is liable to the owners, for injury sustained by the horse and carriage, through the negligence of the driver, driving in the course of his employment. Where the servant of the hirer steals the goods hired and thereby commits a tortious act giving the owner a right of action for conversion against the servant, the hirer is not liable to the owner. Where a wayfarer is injured by the negligence of the servant, driving in the course of his employment, the master (hirer) is responsible to such wayfarer.

Ex-Parte **Schofield,** 1891, II. Q. B. 429.

Nuisance, order for abatement of—No mandamus to compel statement of case for opinion—Appeal—Criminal cause or matter —Judicature Act S. 47.

The Queen's Bench Division refused to grant an order *nisi* for a mandamus to compel a magistrate who had made an order for the abatement of a nuisance to state a case for the opinion of the court. *Held* that no appeal lay to the Court of Appeal as the decision of the Queen's Bench was given in a " criminal cause or matter" within the meaning of S. 47 of the Judicature Act of 1873.

Allchurch *v.* **Assessment Committee and Guardians of Hendon Union,** 1891, II Q. B. 436.

Separate parts of a house—Letting to two tenants—Joint user of portion—No rating jointly.

Separate parts of a house not structurally severed were let to and occupied by two tenants and there was a joint user by them of a front garden and the backyard. *Held* that the tenants could not be rated as joint occupiers and that each was the occupier of a separate tenement capable of being rated.

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*JOTTINGS AND CUTTINGS. [*654]

Law officers and Private Practice.—Speaking of the private practice of the law officers of the Crown in England, the *Law Times* says, " It was not to be expected that the House of Commons would readily adopt the suggestion that law officers of the Crown should be required to decline private practice. The question was hardly seriously debated, whereas it in fact requires the greatest consideration. Another Parliament will not improbably be disposed to say that the position of these members of the Government should not remain as it is, but the disadvantage attending their withdrawal from the everyday life of the bar is a matter which must always weigh heavily."

In this connexion we may observe that the law officers in India enjoy the same liberty of private practice as their brethren in England, and we would not desire the rule to be altered. We wish however to draw attention to a departure that has recently been made by Government, of allowing the Advocate-General (who stands somewhat in the position of the Attorney-General in England) to appear against the Crown in criminal cases. The practice

had always been the other way before Mr. Spring Branson obtained the permission of Government to defend Bysani Rengaiya Chetti at the Madras Sessions some months ago. It may look ungracious in Government to refuse to a leading practitioner the chance of earning a handsome remuneration, but the Advocate-General, who in criminal cases tried by the High Caurt, may, at any moment, have judicial duties to perform under S. 26 of the Letters Patent, *i.e.*, of certifying that in his judgment there has been an error of law in the charge of the presiding judge to the jury, should not be permited to identify himself with the prisoner. Moreover the ex-officio adviser of Governmeut on questions relating to the reduction of sentences imposed by judicial tribunals and on the advisability of prosecutions, should not be placed in a position, which is likely to impair the value to be attached to his impartial opinion. We must therefore express our disapproval of the general sanction that appears to have been given to the present Acting Advocate-General to appear for prisoners in criminal cases.

[*656] **The International Association of Penal Law.*—An Association called the International Association of Penal Law has been in existence for many years. The aims and principles of this international organisation are as follows :—

I. The International Criminal Law Association holds that crime and its repression should be considered from the social as well as from the juridical standpoint. It purposes the incorporation of this principle, and the consequences which flow from it, in the science of criminal law and in penal legislation.

II. The association adopts, as the fundamental basis of its labours, the following propositions :—

1. The purpose of criminal law is the struggle against crime viewed as a social phenomenon.

2. Penal science and penal legislation should take into consideration the results of anthoropological and sociological studies.

3. Punishment is one of the most efficacious means at the disposal of the State in combating crime. It is not the only means. It should not be separated from other social remedies, and especially from preventive measures.

4. The distinction between habitual and occasional delinquents is essential in practice as well as in theory, and should be at the base of provisions of the penal law.

5. As the administrations of criminal courts and of prisons pursue the same end, as the significance of the sentence depends

upon the mode in which it is carried out, the distinction common in modern law between the repressive organs and the prison organs is irrational and hurtful.

6. Restraint of liberty occupying justly the first place in our system of punishments, the association devotes special attention to all that concerns the improvement of prisons and allied institutions.

7. With respect to punishments by imprisonments of short duration, the association considers that the substitution for imprisonment of measures of an equivalent efficacy is possibe and desirable.

8. With respect to punishments by imprisonment of long duration, the association holds that the imprisonment should not depend only upon the results obtained by the penitentiary system.

9. With respect to incorrigible, habitual delinquents, the association holds that the penal system should aim at placing such delinquents beyond the possibility of harm for as long a time as possible, and this independently of the gravity of the offence, even when there is merely a repetition of minor offences.

National branches of the union have been formed in almost all countries, to facilitate the work of the international body by discussion of the different topics, and meetings are held previously to the annual congress. Among* the members we find the names of the most eminent jurists and scientists of all countries. The merit of having founded the union lies principally with Professor Von Liszt, who is well-known in Europe by his learned treatise on criminal law and other works on penal law topics, and is also the chief editor of the standard German criminal law magazine (*Zeitschrift für die gesammte Strafrechts wissenschaft*). The main question that occupied the attention of the association at the second meeting, held at Berne, Switzerland, in August 1890, were the treatment of minor and habitual offenders, which had been already criticised as needing reforms at the meeting in Brussels. The association then declared the greatest defect of the present system of treating habitual offenders to be a lack of classification, the uniformity in the treatment of habitual and occasional offenders, and the abuse of short sentences, which permit habitual offenders to return to society without sufficient protection of the latter. The main topic of the second meeting was therefore: How shall the law define incorrigible and habitual offenders, and what measures shall be recommended against this class of criminals. [*657]

The very lively debate of this important subject showed the usefulness of the union. The scientists, representing France,

Germany, and Russia, stood on so different grounds, that, if the association had no other aim but to give to the leading persons interested in criminal law an opportunity to exchange their ideas, its work would be of the greatest value.

The resolution finally adopted by the association was a compromise of the contradictory views of its members. It reads as follows: There are offenders for whom, on account of their physical and moral defects, the common reaction of ordinary punishment is insufficient. To those belong the recidivistes, who must be counted among the degenerated or professional criminals. Special measures must be taken against these persons, according to the grade of their depravation and the danger they expose to society."

In regard to juvenile offenders, the association resolved, after a very interesting discussion, that no prosecuting steps shall be taken against children, but criminal prosecution shall be substituted by measures of an exclusive educational character. A child shall not even be punished if it had the capacity of distinguishing between right and wrong.

As the association holds that short imprisonment confirms too often men in criminal conduct, it discussed at its first and second meeting the various substitutes for this punishment.

As one of such means, it recommended at the session in Berne that punishment by imprisonments of short duration can be replaced by sentencing the offender to compulsory work without imprisonment.

Though the birthplace of the International Association is Brussels, the evidence of its vitality has been given at the second meeting at Berne.

The interest aroused in all parts of the civilised world for this young body was unusually great, and the increase of the number of members showed that the foundation of such an organisation was timely.

[*658] *But better guarantees than all this outer success are the earnestness, the love for humanity, connected with the sense of justice, which unite its members to a strong body in the struggle against crime. Indeed, when leaving the hospitable city in which the second meeting was held, and separating from the members of the association, every one of the attendants, though coming from different parts of the globe, felt as leaving long known, dear friends.

There is also neither theoretical fanaticism nor vague idealism to be found among the leaders of the union, but that noble spirit which makes the work of the association, as the president of the Swiss Republic said in his opening address, "The dawn of a reform which will be distinguished in the history of criminal law, and therefore, also, in the history of mankind."—*Medico-Legal Journal.*

The French Bar :—In the course of an Article on the French Bar in the July part of The Juridical Review, Mr. G. W. Wilton says:—"The advocate is at all times free to accept or refuse briefs, save in criminal cases, where he cannot decline the duty of defence when assigned to him by the court, for, in such cases, a refusal without valid excuse would render him liable to an infraction of the Penal Code. The Code also, by the way, prohibits him from revealing secrets, *sous peine d'amende*,.................. No action for fees is allowed. Some litigants taking advantage of this, withhold *honoraria*,.................. Some members of the French Bar, particularly M. Mollot, give expression to views in reference to the profession which, we fear, are rarely acted upon in France. Thus, an advocate is advised to abstain from accepting too great a number of cases, lest, surcharged with business, he may become covetous, and in the long run suffer the loss of his abilities. M. Mollot tersely says that, in his opinion, this covetousness "kills" talent, whereas an English lawyer would be apt to say that his forensic powers increase in ratio to his briefs. The Scottish Bar does not present a state of matters, so common at the English Bar, of leading counsel accepting briefs in the no doubt sanguine expectation of pleading them, but with prospects, from the briefs they already hold, so remote as to deprive them of nearly all hope of doing so. Solicitors, in this country, are much to blame for the system against which they complain so vehemently; but at the same time, counsel in such positions, might do well to listen, if only in the interest of the junior Bar, to the kindly advice of the French authors on this point. Acceptance of certain cases may, say the French writers, puzzle the advocate, and in such a predicament, legal doubt will permit acceptance, where moral doubt, he is counselled, will suggest the return of the brief; but as an observation of Pascal, '*Combien un avocat bien paye d' avance trouve-t-il plus juste la cause dont il est charge ?*' implies, the moral doubt is apt to merge into legal dubiety when fees accompany the brief, and so set a questioning conscience at rest. Patience is another quality recommended to the French advocate, for, he is told, his profession is not an industry in accordance with which he may, like his English brother, regulate his consultations by the clock."

[*699] ## *LANDLORD AND TENANT—ADVERSE POSSESSION.

The decision reported in *Sankaran* v. *Periasami*[1] is one of importance as laying down a rule of law which will be of constant application. In that case, the Zamindar of Sivagunga sued the defendants, who were in possession paying *poruppu* since 1830 under a gift from the then Zamindar, who was held subsequently to be a usurper. One of the questions argued was whether such payment prevented the operation of the Statue of Limitations which would have otherwise barred the Zamindar's right to recover possession. The learned judges held, "that possession of a limited interest in immovable property may be just as much adverse, for the purpose of barring a suit for the determination of that limited interest, as is adverse possession of a complete interest in the property to bar a suit for the whole property," and relied on *Madhava* v. *Narayana*.[2] As it appears to us that the authority cited does not fully support the conclusion, we shall refer to some of the leading cases on the point, and examine how far they support, or conflict with, the rule thus laid down.

For the rule of English law on the subject, we may refer to *President and Governors of Magdalen Hospital* v, *Knotts*.[3] The facts in that case were these. The Governors of the Magdalen Hospital, a corporation within the meaning of 13 Eliz., Ch. 10, made in 1783 a lease of certain land of the hospital for ninety-nine years, at the rent of "one peppercorn (if lawfully demanded)." The lessees covenanted to indemnify the governors from all taxes, &c., during the term, and to surrender the premises at its end. Nothing was done till 1876 to avoid the lease or interfere with the persons holding the land. In that year, the governors brought an action to
[*700] recover possession of the land thus leased.* It was held by the House of Lords that the lease was absolutely void and the claim was barred under 3 & 4 Wm. 4, Ch. 27, S. 2 as the right of the governors to re-enter on the land existed from the moment of the execution of the lease, and such right had not been enforced till then. But in so holding, *Lord Selborne* observed, "If any rent had been reserved and received, however small, the legal relation of a tenancy from year to year would have been created, and the Statute of Limitations could not have run." The Lord Chancellor said, "My Lords, holding, as I do, that the lease of 1783 was absolutely void, the respondents, or those whom they represent, must be taken to have been in possession of the property from 1783 without any title whatever: and not having paid rent to the appellants, or in any

1. (1890) I. L. R. 13 M. 467. 2. (1885) I. L. R. 9. M. 244.
3. (1879) 4. A. C. 324.

other way entered into the relation of tenants, there is nothing to prevent the full operation of the 2nd section of the Statute of Limitations, and the right of the appellants to recover the land is, in my opinion, effectually barred." *Lord Gordon* declared that as the defendants "have not paid rent to the appellants, or in any other way entered into the relation of tenants" the appellant's right was barred. So the Law Lords were unanimously of opinion that if any rent however small had been paid to the plaintiff, then the relation of landlord and tenant would have existed, and there would have been no bar, though such payments might have been made with reference to the title set up by the defendants. This is only in accordance with the general rule of law, that if a person not having authority to execute a deed, or having such authority in certain circumstances which did not exist, executes a deed, the persons who are not bound by it may treat it as non-existent and sue for their right as if it did not exist. If the statutory period has elapsed, then they will have to prove that their claim is not barred, either by showing payment of rent, which, as their lordships observe, would establish the relation of landlord and tenant, or in some other form.

It may be remarked that if a claim is not barred under the English Limitation Act, then it cannot be barred under the Indian Act; as under the former, the period begins to run from the date the right of entry accrues, and adverse possession cannot begin under the latter till the accrual of such right.

Turning now to the cases decided by the Privy Council, in *Rajah Sahib Pershad* v. *Kishore Singh*,[1]* their lordships hold that to plead limitation against a Zamindar, who claimed to recover possession, the defendant who set up a *Mocurrery* tenure must prove plaintiff's knowledge of the title set up 12 years before suit. [*701] It is not an authority for the proposition that, if knowledge is proved, then the suit would be barred by limitation, notwithstanding any payment of rent. But it is presumably an authority for holding that it is open to a *Mocurreredar* to plead adverse possession in certain cases. If the tenure was created at least 12 years before the institution of the suit, and it is proved invalid, then the House of Lords' case would show that the suit would be barred, as the possession of the defendant would be without any title. What the effect of payment of rent would be, was not a matter for consideration in that case. In *Shaikh Nujmoddeen Hossein* v. *Mr. Lloyd*[2] the Calcutta High Court seem to consider that this

1. (1869) 12 M. I. A. 323. 2. (1871) 15 W.R. 232.

ruling conflicts with the principle that " a title to be adverse must be such as is inconsistent with any title whatever in the opposite party," and they further observe that " the cases cited appear at first sight to go to that length." We do not think so. What the House of Lords and the Privy Council hold in the two cases is that, where the title alleged by the defendant is found to be invalid and is repudiated by the plaintiff, then the plaintiff not being able to refer the defendant's possession to any title consistent with the plaintiff's right to recover, the plaintlff's claim after the statutory period is barred. The Privy Council's decision is not only not opposed to, but is strictly in conformity with, the rule that possession is adverse, only when it is inconsistent with any title in plaintiff. *Tekaetnee Goura Coomaree* v. *Mussamut Saroo Coomaree*[1] lays down the same rule as in *Rajah Sahib Pershad* v. *Kishore Sing*[2] already referred to. There a suit was brought on a ticca lease of 1851, the defendants claimed under a *Mokurrure* grant of 1793. On the question of limitation their lordships were of opinion that the statute does not begin to run until the Zamindar has had notice that title was claimed under the *Mokurrure* grant, though the plaintiff's *Kabooleats* were found forgeries. As in the other case, it was not necessary to consider whether the claim was barred, assuming notice and payment of rent. But seeing that the plaintiff's case was found to be false and his *Kabooleats* forgeries, it would seem to be a strong authority for holding that mere possession was not notice of the title alleged by the defendant. [*702] *In *Ram Chunder Sing* v. *Madho Kumari*,[3] in which the question was whether the defendant held on a tenure, which the plaintiff was entitled to determine, limitation was pleaded, and the High Court held that tenure set up by the defendant being of a permanent character was adverse for a long period of time to the claim of the plaintiff and his ancestors, which was to resume the tenure at will, and that it was not the less adverse on account of the payment of rent, which was an incident of the tenure. But their lordships of the Privy Council held that the statute began to run only from 1873, when the plaintiffs had notice of the defendant's claim, and not before, and as the suit was brought within 12 years from that date, the suit was not barred. Here again, it became unnecessary to decide the question raised in *Sankaran* v. *Periasami*[4] and the incidental expression that the statute began to run from 1873 can hardly be taken to be an expression of opinion, assuming that the defendants continued to pay rent after 1873.

1. (1873) 19 W.R. 354.
2. (1869) 12 M.I.A. 323.
3. (1885) I.L.R. 12 C. 484.
4. (1890) I.L.R. 13 M. 467.

In applying the rulings of the Privy Council to the cases that may arise in the other Presidencies (the cases referred to being Bengal cases) it must be borne in mind that the tenure holders in Bengal, who pleaded limitation, ought to be considered really as proprietors of the lands claimed, and the Zamindar as being simply entitled to some jumma from the *mesne* proprietors. It is doubtful how far such cases may be followed when dealing with the relation of landlord and tenant.

These are the important Privy Council rulings that may be referred to, in considering the Madras cases.

The earliest case decided by the Madras High Court is reported in *Vairicharla Surya Narayana* v. *Patanjali Shastri.*[1] There a Zamindar claimed to recover possession of a village included in his Zamindari. It was in the possession of the defendant and his ancestors from before the year 1800. In 1807 it was resumed by the Zamindar, when the defendant's ancestor sued to recover possession. The Zamindar then contended that the grant was invalid, but the court found for the defendant's father, and declared that the Zamindar could take possession only under a decree of court. In 1825 the estate was attached for arrears of peschcush, and the village was put in possession of the* Zamindar's grand-mother, who then represented the estate, but on proceedings taken by the defendant, it was finally restored to him in 1857. [*703]

The High Court observed that the ancestor of the defendant having asserted in 1807 against the ancestor of the plaintiff, the title asserted in this suit, and the defendant having been left in peaceable possession till 1825, limitation had clearly begun to run in 1807, that it was impossible to treat the subsequent erroneous incorporation of the village with the Zamindari by the erroneous act of the Collector as in any way interrupting the operation of the statute, which had already begun to run. The High Court observed, " It seems perfectly clear, upon plaintiff's own case, that his suit is now and has long been barred by the Statute of Limitations." " But " they added " the defendant in his written statement relies on the right to hold the village in perpetuity under a grant made before the date of the permanent settlement, subject to a Kattubadi or quit-rent payable to the plaintiff, the amount of which the defendant distinctly states that the plaintiff has received from him since 1857. With this defence on record, the plaintiff's claim to eject cannot now be disposed of absolutely on the ground that it is barred by the Act of Limitations." Here there was notice

1. (1866) 3 M.H.C.R. 120.

of the claim in 1807, and yet the High Court held that there was no limitation on the ground that the defendant continued to pay rent and that the validity of the tenure set up by the defendant must be decided. They also hold that but for payment of rent the suit would have been barred by limitation. The case seems to be on all fours with the House of Lords' case, and the conclusions arrived at are exactly the same.

The decision of *Sankaran* v. *Periasami*[1] which has led to these observation seems to be in direct conflict with this case in *Vairicharla Suriya Narayana* v. *Patanjali Shastri*[2] and also opposed to the case decided by the House of Lords. That decision purports to follow the case in *Madhava* v. *Narayana*.[3] There the defendant was in possession under a kanom tenure created in 1868 by the then representative of a joint Hindu family. The suit was brought to recover possession of the properties after 12 years from that date freed from the kanom on the ground that the same was not contracted for any purpose binding on the family. It was
[*704] pleaded that the plaintiff was only entitled to* recover on the footing of the kanom. *Mr. Justice Muthusami Aiyar* held that the grant of the kanom was an alienation to the prejudice of the joint family and that if the kanom was legally inoperative and could be treated on that ground as non-existent, the respondents would have been in possession as trespassers, and such possession would be a sufficient answer to a claim to eject, when it has extended to more than 12 years, and *Mr. Justice Hutchins* also held that they were either trespassers or kanomdars. If trespassers, having continued in possession for 12 years, the suit was barred. If kanomdars, then also the suit to recover must fail.

It will be noticed that the reasoning is substantially the same as that of the High Court in *Vairicharla Surya Narayana* v. *Patanjali Shastri*[2] and the House of Lords, *i. e.*, if the plaintiff repudiates the title under which the defendant is alleged to hold and such title be found not to be available as a ground of defence against the plaintiff, then the plaintiff cannot rely on such allegation of title by the defendant to escape the operation of the Statute of Limitations and the defendant will be treated as a trespasser. This is all that was really decided and it was not necessary to decide anything more. But the reasoning will not hold good, as observed in the two cases above cited, when the plaintiff can show from other evidence that defendant is not a trespasser. In *Madhava*

1. (1890) I.L.R. 13 M. 467. 2. (1866) 3 M.H.C.R. 120.
3. (1885) I.L.R. 9 M. 244.

v. *Narayana*[1] if the kanom was inoperative, then the defendant's possession would clearly be that of a trespasser, but if the kanomdar had paid any rent, even though reserved under the kanom deed, then according to the other cases the relation of landlord and tenant would have been created and there would have been no bar.

The cases relied on as authorities make this clear. The two cases relied on and followed in *Madhava* v. *Narayana*[1] are reported in *Dinomoney Dabea* v. *Doorgapersad Mozoomdar*,[2] and *Maidin Saiba* v: *Nagapa*.[3] The Bengal case explains very clearly the grounds upon which all these decisions proceed. In that case a *maurasi* tenure was set up by the defendants, which was not proved. The question then raised was whether the defendants could rely on their possession beyond the statutory period found to be, of trespassers, in bar of the plaintiff's claim to eject. As *Mr. Justice Mitter* says, "An allegation of fact found to be untrue must be treated as such for all purposes of the suit; inasmuch as it would be obviously illogical and unsound to make one* and [*705] the same decision depend upon two states of facts diametrically opposed to each other. If we decide, as a matter of fact, that the defendants were trespassers, we cannot in the same case overrule the plea of limitation upon the assumption of quite a different state of facts, namely, that the defendants are the tenants of the plaintiffs." The Bombay Court cites and follows the decision. The Bengal case was decided in 1873. The House of Lords' case was decided only in 1879.

But the case *Drobomoyi Gupta* v. *Davis*[4] apparently supports the view taken in *Sankaran* v. *Periasami*.[5] There the defendants were in possession of lands granted on a *jungleburi* tenure by R, a Hindu widow, who died in 1861. She was succeeded by her daughters who had notice of the title under which the defendants held the lands. However they received the rent reserved under the original grant evidenced by a dowl, though they denounced the deed as a forgery. The question was whether the grandsons, reversioners, were barred because 12 years had elapsed from 1861. Receipt of rent by the daughters was relied on by the plaintiffs as showing ratification of the widow's grant, in which case limitation would begin to run only from the date the reversioners succeeded to the inheritance. But the learned judges held that the plaintiff's suit

1. (1885) I.L.R. 9 M. 244.
2. (1873) 12 B.L.R.. 274.
3. (1882) I.L.R. 7 B. 96.
4. (1887) I.L.R. 14 C. 323.
5. (1890) I.L.R. 13. M. 467

was barred notwithstanding such payment. The effect of such payment as creating the relation of landlord and tenant does not seem to have been considered. However on the facts this case supports, as already said, the view in *Sankaran* v. *Periasami.*[1]

The result of the decided cases may be summarized thus:— *President of Magdalen Hospital* v. *Knotts*[2]; *Dinomoney Dabea* v. *Doorgapersad*[3]; *Moidin Saiba* v. *Nagapa*[4]; *Vairicharla Surya Narayana* v. *Patanjali Shastri*[5]; and *Madhava* v. *Narayana*[6]: these cases lay down that when the title on which the defendant holds is repudiated by the plaintiff and is found to be invalid, then the defendant must be treated as a trespasser, and if the statutory period elapse, the plaintiff's claim is barred. *President of Magdalen Hospital* v. *Knotts*[2] and *Vairicharla Surya Narayana* v. *Patanjali Shastri*[5] hold further that where rent is paid even though it may have been paid under the terms of the invalid deed, then the relation of landlord and tenant would be created and there is no bar of limitation. In the other three cases this question was not raised and decided. But the arguments relied on tend to such a conclusion. *Sankaran* v. *Periasami,*[1] and apparently *Drobomoyi Gupta* v.
[*706] *Davis*[7] hold that though there* was payment of rent, the suit to recover would be barred by limitation. It will be seen from the above statement that in our opinion the judges in *Sankaran* v. *Periasami*[1] were wrong in considering *Madhava* v. *Narayana*[6] as supporting the view that even where there is payment of rent, the suit would be barred.

The principle laid down in *Sankaran* v. *Periasami*[1] and *Drobomoyi Gupta* v. *Davis*[7] seems to be that where the defendants hold the lands to the knowledge of the plaintiffs on a claim, then, after the statutory period, the plaintiffs cannot get rid of that claim, though such title was originally invalid as against the plaintiffs. The principle followed by the other cases seems to be that where the plaintiff can refer the defendant's possession to a title consistent with the plaintiff's right to recover, then the presumption will be raised that he holds under that title not under the wrongful title which will be perfected by prescription, the presumption of law always being that possession is legal or lawful and not wrongful. The matter therefore can hardly be said to be concluded by authority.

1. (1890) I.L.R. 13 M. 467.
2. (1879) 4 A.C. 324.
3. (1873) 12 B.L.R. 274.
4. (1882) I.L.R. 7 B. 96.
5. (1866) 3 M.H.C.R. 120.
6. (1885) I.L.R. 9 M. 244.
7. (1887) I.L.R. 14 C. 323.

Under English law the question of adverse possession is not now of much importance; there the question after 3 & 4, Wm. 4, Ch. 27, S. 2 being whether the statutory period has elapsed since the right of entry accrued. But before that time the question whether possession was adverse or not apparently depended upon a consideration of the fact whether the defendant's possession was inconsistent with a freehold in the plaintiff. If the defendant's possession was so incompatible, then the possession was adverse and not otherwise. It is very doubtful whether this principle would be applied to India. It had its place in the Feudal system, but the observations of their lordships of the Privy Council in *Mahxrajah Rajundur Kishwur Sing* v. *Sheopursun Misser,* [1] leave the question an open one. Those observations seem to imply that the defendant must claim to be the proprietor to have the benefit of the statute.

Laws of Limitation are not founded on natural justice. They rest on expediency. Every system of jurisprudence has recognized the necessity of giving peace and quiet to those who have been in possession for a certain length of time, and in considering the scope and aim of the provisions of the Indian Limitation Act, *regard must be had to the peculiar circumstances of this country. [*707] It appears to us that there is no reason why a tenure-holder, or a tenant who has been in possession for a certain length of time, should be required to prove the validity of his claim in a court of law. The peculiar considerations of the Feudal law apart, it would seem that the grounds which tell in favor of one who claims ownership in the lands, and who has been in possession for a certain time, peaceably, and openly asserting his right, equally apply to the case of a man who claims only a limited interest—say for instance a tenure-holder, or a tenant who asserts a right of occupancy. Public policy certainly requires that they should be protected. In India, lands are generally brought under cultivation and capital is laid out on land improvement more by the tenants than by the landlords. Legislation in India has proceeded on the view that the capricious eviction of tenants from their holdings is not beneficial to the public, and the fear that they are liable at any time to be evicted even after a long time is likely to operate on them to the detriment of improvement in cultivation. The matter is complicated by the joint family system. A defendant who claims only a partial interest may find himself called upon after many years to defend his title against some member who has only recently succeeded to the management.

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1. (1866) 10 M.I.A. 438.

But this rule that long, peaceable, and open possession ought not to be interfered with, must of course be controlled in its operation by certain other considerations which are applicable to a claimant or plaintiff. It would be obviously unfair to deprive a man of his rights without giving him an opportunity to secure his claim from disturbance. The plaintiff must therefore have the means of preventing the growing acquisition of his opponent's right. He must therefore have knowledge of his claim. He must have the power of prohibition, and it is only if he abstains from taking any steps in such circumstances that he ought to be held to be barred, that adverse possession should be held to run against him.

Applying these principles to the case of a claimant like the plaintiff in *Sankaran* v. *Periasami*,[1] it has first to be observed that limitation cannot be said to run from the date of the creation of the tenure, as possession alone cannot be said to be notice to those who are entitled to succeed to the Zamindari. The Zamindar is entitled [*708] *to grant the lands on ordinary leases which are not detrimental to his successors. There is *prima facie* nothing to show to the members of the family who would be entitled to succeed that the possession is held on a specific title. As the Privy Council observe in *Ram Chunder Sing* v. *Madho Kumari*[2] there could be no adverse possession when there was no dispute or conflicting claim. Even after the death of the grantor, possession can hardly be said to be adverse, as his successor may well refer the defendant's possession to an ordinary tenancy determinable on notice, if he is in receipt of rent. Of course if there is no payment of rent, then the plaintiff would be put on enquiry. If the successor has knowledge of the claim advanced, or if the circumstances are such that knowledge, as a fact, may be presumed, and it further appears that he continued receiving rents, then it appears to us that his claim ought to be rejected either on the ground that payment of rent is only incidental to the tenure under which the defendant holds the lands or on the ground of ratification. But even assuming that the junior members of a joint family or those entitled to succeed the Zamindar had notice of the claim, it appears to us that they should not be held to be barred. For it is not in their power to recover possession from the tenant. The grantor would be precluded from impeaching his own grant and the conclusion that we arrive at, is that limitation would not run in the lifetime of the grantor, that it would begin to run only after his successor or any

1. (1890) I.L.R. 13 M. 467. 2. (1885) I.L.R. 12 C. 494 (494).

of his successors had notice of the particular claim set up, and that possession alone or payment of rent is not evidence of such knowledge.

These conclusions seem to be borne out by the Privy Council decisions above referred to. They do not go so far in favour of the landlord as *Vairicharla Surya Narayana* v. *Patanjali Shastri*[1]; nor so much against him as *Sankaran* v. *Periasami.*[2]

[Since the above article was penned there have been decisions affirming the view taken in the leading case which forms the subject of this article. See *Thakore Fatesingji* v. *Bamanji A. Dalal*[3] *Trimbak* v. *Shekh Gidam Zibani*[4] and *Subbayya* v. *Madduletiah*[5]. In the case of a sale out and out (i.e.) where the right asserted is an absolute title there can be no difficulty. Where the right asserted is of a lesser interest as that of a mortgagee or a lessee, different considerations may arise. In the case of a mortgage adverse possession by prescriptive title may be acquired and that is the decision in the leading case discussed in this article. Even in such a case a question may arise where the property is an endowed property. Prior to the Limitation Act of 1908, article 134 provided a period of 12 years for recovery of possession of immovable properties conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration from the date of the purchase. This article from its terms will apply to all kinds of trust property. As the period to be calculated was from the date of purchase it was held by the Judicial Committee that a purchaser meant only an out and out purchaser (i.e.) a person claiming title under a purchase or conveyance of the fee simple and that a mortgagee or lessee could not be regarded as such a purchaser. *Abhiram Goswami* v. *Shyama Charan Nandi.*[6] This decision will cease to be of any importance after the Limitation Act of 1908 which provides 12 years from the date of *transfer* and not from the date of purchases. See *Ishwar Shyan Chand Jin* v. *Ram Kanai Ghose.*[7] As regards leases of charity or endowed lands if the lease is void and the lessee under the void lease paid rent the payment of rent created in law a tenancy from year to year. This presumption of tenancy from year to year will apply in the case of agricultural lands. See the observation of Lord Selborne in *President of Magdalen Hospital* v. *Knotts,*[8] compare also *Abhiram Goswami* v. *Shyama Charan*

1. (1866) 3 M.H.C.R. 120.
2. (1890) I.L.R. 13 M. 467.
3. (1903) I.L.R. 27 B. 515.
4. (1910) 12 Bom. L.R. 208.
5. (1907) 17 M.L.J. 469.
6. (1909) I.L.R. 36 C. 1003 (1014—15).
7. (1911) I.L.R. 38 C. 626.
8. (1879) 4 A.C. 324.

Nandi.[1] This last case was based upon a question of limitation. If there was only a tenancy from year to year created by payment of rent though under a void lease no question of limitation could arise unless the tenancy was determined :—ED.]

HINDU LAW—THE RIGHTS OF A PURCHASER FROM A HINDU CO-PARCENER.

In April last, a Full Bench of the Madras High Court for the first time decided in *Rangasami* v. *Krishnayyan*[2] a question of great importance in Hindu Law, the rights of a purchaser of family property from an undivided Hindu co-parcener. For a long time,
[*709] the courts, both of *Madras and Bombay, have held that an undivided member of a Hindu family may alienate for valuable consideration his share in the family estate or any portion of it. But the question did not till lately sharply arise for decision, what the rights of the purchaser are, in cases where, before he sues to enforce his rights under the alienation, owing to changes in the constitution of the family of his vendor, the share of the latter has increased or diminished since the alienation. Suppose for instance his share, which was one-fourth at the time of the alienation, is reduced to one-eight, or increased to one-half, at the time of the suit, by an increase or decrease in the number of the members of the family. Is the vendee entitled to the share of the vendor at the time of his purchase, or does the value of his purchase vary with the share of his vendor in the family property until he enforces partition? The answer of the Full Bench of the Madras High Court is, that the share to which the purchaser is entitled is liable to change, and that if the co-parcener's share is reduced subsequent to his purchase by the birth of new members in the family, the share to which the alienee would be entitled will also be reduced. Their lordships refused to decide whether the purchaser's share would increase in the contrary case. With all possible respect for the learned judges who took part in the decision, we take leave to express our doubt whether the decision is likely to commend itself either to the profession or to the public in general. The frequency with which the question is likely to occur and the great importance of the decision render it necessary to subject it to a somewhat close criticism.

It is unnecessary for our purpose to refer to the facts of the particular case, beyond stating that it was one, in which the share of the co-parcener, who made the alienation, was reduced from one

1. (1909) I.L.R. 36 C. 1003. 2. (1891) I.L.R. 14 M. 408.

third at the time of the transfer to one-tenth at the time that the vendee sued his vendor and his co-parceners to enforce his rights under the purchase. The case came on at first before *Handley* and *Weir, JJ.* Those learned judges were inclined to think that the plaintiff was entitled only to $\frac{1}{10}$ share in the property, but considered this view inconsistent with an unreported case, *Srinivasa* v. *Gurumurti*, (S. A. No. 49 of 1888), in which a hypothecation by an undivided father was declared to be enforceable after his death against the family property to the extent of his share *at the time of the hypothecation*, though the father died before a suit was filed *to enforce the charge. Hence the necessity for the reference to the [*710] Full Bench. It was then heard by *Collins C. J., Muthusami Aiyar, Parker* and *Shephard, JJ.* The judgment of *Collins C. J.* and *Muthusami Aiyar J.* was concurred in by *Parker* and *Shephard JJ.* The principles enunciated in the judgment of the former are:—(1) " According to the true notion of a joint Hindu family, no individual member of that family, while it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share;" his share is subject to constant change, depending on the number of members in the family at the time. (2) " The purchaser who can only take what can be lawfully sold must therefore be taken to purchase an uncertain and fluctuating interest with the right of converting it at any moment after the purchase by partition into definite separate property." The correctness of the former proposition is beyond dispute, but it is not always properly understood. With regard to the latter proposition, their lordships rely so far as precedents are concerned, on a *dictum* in *Vitla Butten* v. *Yamenamma*[1] and apparently also on the reasoning in certain earlier decisions, where the question for determination was whether a Hindu co-parcener was entitled to alienate his share in family property at all. Let us first examine the former proposition, as we think that many a mistake is often committed by not properly understanding it, and as the judgment we are reviewing is materially based on it. It is frequently stated both in text books and in decisions, that all the co-parceners have a certain right in the whole of the family property, but no one of them can, prior to partition, assert that he has any specific share in it, though he is entitled to have all his legitimate expenses disbursed out of the family exchequer that in a joint Hindu family there are sharers, but no shares. Now what is the exact import of all this? In one sense it is perfectly true that a co-parcener cannot predicate that he is owner of a specific share in family property,

1. (1871) 8 M. H.C. 6.

because he cannot claim a specific share of the *income*, while the family is undivided. But it is equally certain that in another and very important sense, he *does* own a specific share. His share of the corpus at any particular time is perfectly definite and ascertainable. It is simply a matter of calculation depending on what other members there are in the family. If, for instance, it consists of
[*711] A and B, with two* sons each, and three sons of C a deceased brother of A and B, A and B and each of their sons is owner of a ninth share, and each of C's sons is owner of a ninth share. If one of C's sons die, the remaining sons will own each a sixth share. The share is liable no doubt to change, but at any particular point of time, it is as certain and specific as that of any partner in a firm is[1]. In so far as the income is concerned, the statement is quite true that there are no shares though there are sharers. It is also true in the sense that as the sharers change, their shares may increase or decrease, but it is not true, if it is meant to convey the impression that the sharers own only an indefinite share always[2]. If that were so, it would be impossible to make a partition between the sharers.

We may now proceed to consider what the rights of an alienee are. It is perhaps unnecessary to state that the right of a co-parcener to transfer his share for value is an innovation of the British Courts. According to the strict principles of the Mitakshara, such a right was unknown. A single member could alienate family property in certain contingencies in the interests of the family, but an alienation of his own share for purposes of his own was in no instance allowed by the Mitakshara, (Mayne's Hindu Law, S. 328). It is unnecessary to trace at length the manner in which the courts found their way to permit such alienations. The change was first introduced in favour of a creditor holding a mortgage from a co-parcener. The reasoning which led to the change is well expressed by the Madras High Court in *Palanivelappa Kaundan* v. *Mannaru Naikan*[3]: "As the co-parcener has contracted, he ought to fulfil his contract, he could, if so disposed at any time, according to the doctrine of the Madras School, enforce a partition, and it is only just, that when he has incurred an obligation, he shall not be allowed

1. [Partnership is a false analogy. The Joint Family is very distinct from a partnership. This has been held over and over again. Nor can the share of a co-parcener be said to resemble that of a partner :—ED.

2. *Note* :—This is only a question of language. The co-parceners *cannot* be said individually to own any *definite* share. Each has a share but what that share is definitely and whether he is entitled to any property can be predicated only at the time of partition.

3. (1865) 2 M. H.C. 416.

to escape its effects by the allegation that his own deed was *ultra vires*, but compelled to give his creditor all the remedies to which he would himself be entitled as against the object-matter of his agreement." The courts have refused to extend the doctrine in favour of volunteers, as there is no such equity in their favour. The question is—what is the result of this change, introduced by the courts? Does the alienee stand in the shoes of the co-parcener with all the advantages and disadvantages of his position, or does he acquire the right of the co-parcener, undisturbed by any future changes in the family, and any future *actions of its members? [*712] The view taken by the Madras High Court is that the purchaser is not unaffected by subsequent changes in the family in cases, where, in consequence of them, the alienor's share is reduced, but they seem inclined to hold, although they did not decide, that where the alienor's share is increased by the change in the family, the transferee cannot be allowed to benefit by it. Let us examine their arguments somewhat fully.

According to ordinary principles of law, when a co-owner transfers his interest in the property owned by him jointly with others, the transferee acquires the interest of the transferor as it stood at the date of the alienation and subject to all the equities as between him and the other co-owners, but he is not affected by any future relations between them. If he alienates his interest in any of the partnership properties, his vendee must take it, no doubt, subject to all claims as between him and his co-partners at the date of the alienation, but neither the vendor nor the other partners can affect the vendee's right by any transaction subsequent to the alienations. The courts have thus held that the interests of a partner in any of the partnership properties may be seized in execution, and made available for the payment of his creditors, *Parvatheesam* v. *Bapanna*.[1] The alienation dissolves the partnership, and if the other partners continue the common business, it can only be referred to an understanding to form a fresh partnership. A similar rule applies in the case of joint tenants in England. A joint tenant may alienate his interest, but the alienation works a dissolution of the joint tenancy. See Williams on Real Property, p. 167; see also S. 44, Transfer of Property Act and *In Re Wilks, Child* v. *Bulmer*.[2] The nearest analogy to the interest of a Hindu co-parcener is furnished by that of a joint tenant in England, and the analogy is made closer by the newly recognised right of alienation in a Hindu co-parcener. Now, what reason is there for not following and applying in the case of a co-parcener's alienation the principles that

1. (1890) I.L.R. 13 M. 44. 2. (1891) 3 Ch. 59.

ordinarily obtain when a co-owner of property alienates his interest? It would not be sufficient to say that it is opposed to the old principles of Hindu Law, because alienation by a co-parcener is itself quite opposed to the Hindu Law of the text-writers and commentators. A breach has been made in the Hindu Law and we cannot [*713] help introducing such changes as are required* by the breach. Those principles did not contemplate and can therefore have no application to cases of alienation by a co-parcener of his individual interest in the family property. We must look for guidance to rules regulating alienation by co-owners of their interests, where the alienation is permitted.

The reason stated by the Full Bench for not following the ordinary law as to the rights of alienees is that what is purchased is itself indefinite until partition. As put by *Handley* and *Weir, J.J.*, "He, who purchases the interest of member of an undivided family in the family property, purchases that which is from its nature uncertain, and the purchase must always partake of the nature of a speculative transaction; but he knows perfectly well what he is buying, etc." We have already attempted to analyze the meaning of the statement that the share of a co-parcener is uncertain, and if we are right in saying that it means no more than that though perfectly definite at the time, it is liable to be increased or diminished by future events, it is difficult to see how that could stand in the way of the purchaser getting the share of the co-parcener, as it stands at the date of the alienation. There is the same kind of uncertainty in the case of a partner's interest in the property of the firm, for while it may be very large at the time of the transfer by him, it may in consequence of subsequent losses become absolutely worthless afterwards, but the rule is that the alienation severs the partnership, and accounts must be taken between the alienee and the remaining partners, as they stand at the date of the alienee's purchase, and no future transactions of the firm can affect him either for better or for worse. Similarly in the case of a joint tenant, it may be said that the alienee ought to be aware that his vendor's right may be either lost by his death, or increased by the death of any of his joint tenants. Indeed the learned judges themselves admit that the principle enunciated by them cannot be applied in all cases. When pressed with the difficulty that if an alienee is to be affected by the changes in the constitution of the family after the alienation, it may happen that the alienee may get nothing at all on account of the death of the alienor, their lordships say, "the answer is that the interests carved out by the sale vest in the purchaser *at once*, and that the vendor being competent to sell, his subsequent death is an event which

cannot divest the interest which has once vested." Will not* the same answer apply when the share is simply diminished instead of reduced to nothing? It is not a question of vesting or divesting at all. It is the case of a vested interest which was once valuable turning out to be worthless by after events. If as their lordships hold, the estate taken by the purchaser is an uncertain one, liable to all the fluctuations of his vendor's rights in the family property, how is it possible to escape the conclusion that in consequence of the fluctuation, the purchaser is entitled to nothing. If, on the other hand, the interest vests in the purchaser at once, and cannot be affected by the subsequent event of the alienor's death, why should it be affected by the subsequent diminution of the alienor's interest by an addition to the number of members in the family. Their lordships say, "for the purpose of giving effect to his contract of sale, the purchase must be dealt with, as if the seller were alive when the seller demands partition." Why? It is impossible to answer the question satisfactorily from the point of view of the learned judges, but if we adopt the principle that the alienee acquires the rights of the alienor as they stand on the date of the alienation, the difficulty does not arise. And why is the share to be calculated as it stood at the *death* of the sharer? If it can go on diminishing while he lives, why should it not disappear by his death? It is difficult to see any legal basis for this position that the share should be ascertained not as it stands at the date of the alienation, or at the date of partition but as it was at the date of the alienor's death. Again, with reference to the difficulty, that if the share is liable to roduction, it must be taken also to be capable of being increased, when the number of members in the family diminishes, the learned judges say, "If it appeared that what was bargained and paid for by the purchaser was a specific share or *quantum* of interest, and not the vendor's co-parcenery interest, such as it might be when partition was effected, it may be open to the vendor to say that the purchaser could not claim more than what he intended to buy and actually bought." If the vendor can object to the purchaser getting more than he bargained for, why should not the purchaser claim the whole of what he bargained for? There can be no doubt that a purchaser, in making up his mind as to the price he may pay for a co-parcener's interest, will always have in veiw the value of the share if a partition took place at the moment of sale. It is not possible to make this distinction between cases where an indefinite *quantum* of interest is bargained for, and cases where a specific share is intended to be purchased. [*714]

It is worth while noting that the learned judges who referred the case to the Full Bench did not agree with the Full Bench in

declining to apply the rule that changes in the family will affect the rights of the alienee to cases where the change operates in his favour. The learned judges say, "It was pressed upon us in argument that if this be so, the purchaser might in some cases take nothing, for his vendor might die before anything was done to enforce the purchase, and also that if the purchaser is to be liable to have what he has purchased, diminished by changes in the family, he must also have the benefit, if such changes should increase the share of his vendor. It seems to us that both these consequences logically follow from the legal position which the alienee occupies, and we do not see that they involve any absurdity, etc."

It is impossible to treat the purchaser as standing on the same footing as the vendor, because it would be impossible to confer on him the rights which his vendor had as a co-parcener. The latter has a right, if the *kartha* of the family, to manage the estate, part of which has been sold, but it will be impossible to hold that the purchaser also has the same rights of managing the property sold to him.

The co-parcener has a right to be consulted when family property is about to be sold, but a purchaser cannot have such a right. See *Ballabh Das* v. *Sunder Das*,[1] and *Ganraj Dubey* v. *Sheozore Singh*,[2]. Suppose the *kartha*, or the co-parceners determine to sell the property, a share in which has been already alienated by a co-parcener. If the alienee's rights are quite indefinite until he obtains a partition and liable to alteration by the subsequent transactions of the family, how is he to stop such a sale? If he cannot stop it, is he to lose the rights purchased by him? To take another case, suppose there are four co-parceners in a family, and they all agree to sell their shares (which then make up the whole of the estate) to A, and suppose that after the sale but before A succeeds in getting partition and possession, other co-parceners are born. If the Full Bench decision is to be maintained, it would have to be [*716] held that notwithstanding that all* who were at the time interested in the property sold were parties to the sale, the purchaser is not entitled to the whole of the property. The result of the Full Bench view is that a purchaser is held to have none of the rights of his vendor, but is to be subject to all the liabilities and to suffer all the disadvantages that his vendor as a member of an undivided Hindu family is subject to, or has to suffer. It would be far more reasonable to hold that an alienation by a co-parcener is absolutely void than to maintain such a position.

1. (1877) I.L.R. 1 A. 429. 2. (1880) I.L.R. 2 A. 898.

The decisions of the courts will be found on close examination to have hitherto proceeded on the view that what passes to the purchaser is the estate of his vendor as it stands at the date of the sale, although the exact point in question did not arise for decision. Thus in *Deendyal Lal* v. *Jugdeep Narain Singh,*[1] their lordships, speaking of the right of a judgment-creditor of a Hindu co-parcener to seize his debtor's share of the family property in execution of a decree against him, observed that the position of the co-parcener in this respect is the same as that of a partner, and laid down that the share to which the execution-purchaser would be entitled was that which the co-parcener would be entitled to get by partition *at the date of the alienation.* Their lordships observed: "The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realize its value. It seems to their lordships that the same principle may, and ought to be applied to shares in a joint and undivided Hindu estate; and that it may be so applied without unduly interfering with the peculiar *status* and rights of the co-parceners in such an estate, if the right of the purchaser at the execution-sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, *before the alienation of his share took place.*" A similar view was taken in *Suraj Bunsi Koer* v. *Sheo Prosad Singh,*[2] where the Privy Council held that when a co-parcener dies after his share in the property has been attached by his creditors, his right in the family property at the date of attachment remains available for the benefit of his creditor, the case being on the same *footing as one of alienation. [*717] The same view was taken by the Madras High Court in *Srinivasa* v. *Gurumurti,* (S.A. No. 49 of 1888) which was the cause of the reference to the Full Bench.

In *Mahabalaya Bin Parmaya* v. *Timaya Bin Appaya*[3] the Bombay High Court held that the purchaser becomes a tenant-in-common with remaining co-parceners and if so his right cannot be affected by the subsequent acts of his co-tenants in common. They say: "What that interest was, and how the transaction could be made good, if at all, for the benefit of the purchaser of a co-parcener's interest in a particular piece of land, forming but a part of the common property, would have to be disposed of, if he were seeking possession according to the principles laid down in the case of

1. (1877) L.R. 4 I.A. 247 : I.L.R. 3 C. 198. 2. (1879) L.R. 6 I.A. 88.
3. (1875) 12 B.H.C.R. 138.

Pandurang v. *Bhaskar*.[1] In the present case, however, the purchaser has got into possession, which he now holds with such an accompanying right, as the judgment-debtor could have transferred to him. He is in therefore as a sort of *tenant-in-common* with his coparceners, the plaintiffs. They are entitled to possession in common with the purchaser, and if this be refused, they may enforce their right by a suit for a share of the enjoyment, or for a definition in specie of the portions, in which each party is entitled to have for the future a sole interest. The same view was held in *Babaji lakshman* v. *Vasudev Vinayak*,[2] by *West* and *Nanabhai Haridas*, *JJ.* as well as in *Kallapa* v. *Venkatesh Vinayak*.[3] See also *Pandurang Anandrav* v. *Bhaskar Shadashiv*,[1] and *Vasudev Bhát* v. *Venkatesh Bhat*[4].

We think, therefore, the right view is that as in the case of a partner, joint-tenant, or other co-owner, a Hindu co-parcener by alienating his share in any of the family properties, conveys to the alienee his share to which he would be entitled on partition at the date of the alienation. There is no doubt one important feature in alienations by a partner or a joint tenant which cannot be applied to alienations by a co-parcener. An alienation by the former puts an end to the partnership or the joint tenancy, not only as between the alienating co-owner and the others, but also as between all the remaining partners and joint tenants. But this is no necessary deduction from the right of the partner or joint tenant to alienate,
[*718] and is merely *based on convenience, and the rule might well have been otherwise, and does not apply, we believe, where the partner does not sell the whole of his interests in the partnership, but merely his rights in some particular property, or where his right in specific partnership property is attached by a court. On the whole we think there are no sufficient grounds for adopting the anomalous position of the Madras High Court. So far as the authorities are concerned, we are aware of none in favour of this view except the *dictum* in *Vitla Butten* v. *Yamenamma*,[5] while several dicta of the Privy Council and of the Bombay and Madras Courts are against it. The cases of *Virasvami Gramini* v. *Ayyasvami Gramini*,[6] and *Venkatachella Pillay* v. *Chinnaiya Mudaliar*,[7] cited in the Full Bench judgment do not seem to support the decision. The *dictum* in the latter case that the purchaser does not acquire "any specific portion of the joint family property but only his beneficial estate as an undivided co-parcener with the incidental right of

1. (1874) 11 B.H.C.R. 72.
2. (1876) I.L.R. 1 B. 95.
3. (1878) I.L.R. 2 B. 676.
4. (1873) 10 B.H.C.R. 139.
5. (1874) 8 M.H.C.R. 6.
6. (1863) 1 M.H.C.R. 471.
7. (1870) 5 M.H.C.R. 166.

partition," seems to us in connexion with the context to mean only that if a co-parcener purports to convey a specific item of joint property, his intention will not be carried out by law to its full extent, and the purchaser will get only the alienor's share in it with the right of partition. It does not indicate that the share remains uncertain until partition and is liable to be diminished by subsequent changes in the vendor's family, as held by the Full Bench.

[The question is concluded so far as the Madras Presidency is concerned by a recent Full Bench decision in *Ramachandram Pillai* v. *Kalimuthu Chetti*.[1] There it was held that an alienee of the interest of an undivided co-parcener in a joint Hindu family was entitled to that co-parcener's interest as it stood on the date of the alienation :—Ed.]

MITAKSHARA.

Next the Chapter on (relating to) Prayaschitta.

The Section on Impurity.

Salutation to *Ganesa !* Salutation to *Saraswati !* Salutation to preceptors (elders). The duties essential (or usual) and occasional of persons belonging to the order of *grihasthâs* (*i.e.,* house-holders) have been described. The duties incidental to the quality (of royalty) of that special class of house-holders possessed of the attribute of anointment, etc. (as kings),[2] have also been pointed out. The exceptions to those duties (obligations) will now be expounded by a treatment of (the subject of) *âsaucha* (or impurity) which is the cause of a diminution of competency for those duties. By the word *âsaucha* is meant some peculiarity attached to men which is capable of being removed by (the lapse of a certain) time, * bathing, etc., and which gives occasion for the observance of the offering of funeral cakes, libations, etc., and for the exclusion (prohibition) of sacred studies, etc.; but not a mere incompetency for rites, because of the mention of impurity (अशुद्धत्व) in the passages such as " all the kinsmen (Bandhavas) are impure,[3] " because here the word *impure* (अशुद्ध) is by usage not being employed only (to denote) persons incompetent for rites such as those who are not Âhitâgnis,[4] who are Dikshitas,[5] etc., and because our knowledge of the meanings of words is dependent upon our proficiency [*719]

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1. (1911) 21 M.L.J. 246.
2. Such as protection of subjects, clemency, etc.
3. Manu, Ch. V, S. 58.
4. i.e. those who maintain the sacred fire. A person who is not a Âhitâgni is incompetent to maintain the sacred fire.
5. i.e. those who are under vows. A person under vow is not competent to do any act (Karma).

in (or our being perfectly conversant with) the usage of elders.[1] Moreover, if the word *âsaucha* by reason of the demonstration appearing from the prohibition of gifts, etc.. is to be taken as signifying also such incompetency, then in such a case it must, by the demonstration appearing from the Vidhi relating to gifts of water, etc., also connote (or signify) such competency. This view should be disregarded as it is open to the objection of assigning different meanings to the same word.[2]

The author now describes what should be done by *sapindas* and others who are under *asaucha* or impurity.

1, 2. One should bury (a child) below two years and should not offer any libations of water. Any other (who dies above that age) should be followed to the burning ground by kinsmen and should be cremated with the secular fire by (the kinsmen) reciting the hymns (Sukta[3]) and vedic verses (Gatha) to Yama. If invested with the sacred thread, he should be efficaciously cremated in the mode prescribed for an Ahitagni.

One below two years, *i.e,* one who has not completed two years. This deceased child one "should bury," *i.e.*, dig a pit in the earth and deposit it, *i.e.*, one should not cremate it. Nor should one perform the exequial rites, such as libations of water, etc., prescribed with reference to deceased persons in the texts beginning with "The kinsmen offer a libation of water once[4]" And such a child (deceased) should be decked with scents, wreaths, (covered with) unguents, etc., and should be buried in a clean place other than the burning ground and outside the village, and free from heaps of
[*720] bone. So Manu says[5]: "The kinsmen shall adorn * the corpse of a child below two and shall bury outside (the village), in a clean place free from heaps of bone. For him (the child) cremation should not be performed and offerings of water should not be made. Leaving him like a piece of wood in the forest they should pass

1. The old translation is "because our knowledge of the meanings of words is determined by their acceptation in the usage of elders."

2. The discussion here is this :—The word "impure" (अशुद्ध) is different from अनधिकारि i.e the word अशुद्ध does not denote a person who is incompetent merely to perform a rite. You can't say a person incompetent to perform the rite is Asuddha (अशुद्ध) as you can say a person who is Asuddha is incompetent to perform the rite of giving (libations of) water.

3. A Sukta is to be distinguished from a Ric. The former is a whole hymn while the latter is a single verse of a vedic hymn.

4. Yajnavalkya, Ch. III, S. 5.

5. Manu, Ch. V, Ss. 68, 69.

three days." The meaning of the words "leaving him like a piece of wood in the forest" is this:—Just as people leaving a piece of wood in the forest become indifferent about it, so after leaving the child below two in the pit, (the kinsmen) should omit the *sraddha* and other exequial rites. The non-existence of Sraddhas, etc., according to usage (Achara), etc., is indicated by this illustration. And the child should be anointed with clarified butter and buried by persons (kinsmen) reciting verses to *Yama* (the God of Death), as it is ordained in the *Yama* Smriti that "one should bury the corpse of a child below two anointed with clarified butter in some place outside (the village) singing hymns to *Yama* and repeating the verses to *Yama*." **Other**, *i.e.*, one who is other than he who dies below two, *i.e.*, one who has passed two years and died. This child should be followed *i.e.*, accompanied to the burning ground by *jnatis*, *i.e.*, *sapindas*, and *samanodakas* led by the elders among them. From this text it is understood that in the case of children below two, following is not obligatory. He (one above two) should be followed and cremated with the secular, *i.e.*, unconsecrated fire, if fire produced from the *Arani* stick produced for him is not available, by the (kinsmen) reciting the hymn to *Yama*, beginning with Pareivamasam [1] "who has conveyed" and the verses addressed to *Yama* (the God of Death). If *Arani* sticks produced for him are available, he should be cremated with fire produced by the friction of the sticks and not with secular fire, as the *Arani* is produced only for the purpose of performing things to be done (to the child) by fire. And secular fire refers to fire which is other than that of *Chandalas*, etc., and which is fit to be used. As *Devala* has said, "the fire kept by *Chandalas*, or in filthy places, or in a lying-in chamber, or by degraded persons or belonging to a funeral pyre is not fit for use by good men."

And *Laugakshi* has laid down a special rule here: "One should make the offering of water in silence (i.e without mantras) and should perform cremation in silence (i.e without mantras) in the case of all whose tonsure has been performed, and * in other cases [*721]
may perform both (cremation and offering of water) according to his own choice." This is the meaning. In the period subsequent to tonsure, cremation and the offering of water should be invariably performed. In other cases also, *i.e.*, after *namakarana* (ceremony of giving a name to the child), even though tonsure has not been performed, both cremation and the offering of water may be silently (i.e., without mantra) made with a view to promote the (spiritual) welfare of the deceased, (in other words)

1. Taittiriya Aranyaka Prapataka, Ch. VI, Anuvaka 1.

not compulsorily. Thus an option (is provided). Manu[1] has also laid down a special rule here, "For one below (i.e., who has not attained) three years, no offering of water should be given by (kinsmen). But if the child has cut its teeth or if a name has been given (to the child) it may be done optionally." The mention of water is intended to indicate cremation also, by association. As the words "one who is below (i.e., who has not attained) three" are used, the rule as to cremation and libation is understood (to be applicable to one) after three years even though tonsure is postponed according to family usage. It should be understood from the text of *Laugakshi* that even in the case of one below three on whom tonsure has been performed, both (cremation and the offering of water) are enjoined. **If invested with the sacred thread,** *i.e.*, if *upanayana* has been performed, he must be cremated only with secular fire in the method prescribed for (cremating) *Ahitagnis*[2] in the *Grihya* ritual (governing the deceased). "**Efficaciously,**" *i.e.*, so as to secure benefit. The meaning is this. Whatever rite (among those prescribed for *Ahitagnis*) has an effect of obvious utility must be adopted such as clearing the ground and sprinkling it (with water). But whatever is of no manifest utility need not be observed, as for instance, the arrangement to the sacrificial vessels in a particular way on the body of the corpse. So by the prescribing of secular fire in the case of one who has been invested with the sacred thread and by the prescribing of cremation with the *Grihya* fire in the case of a house-holder who is not an *Ahitagni*, the sacrificial fires, such as the *Ahavaniya* and the rest need not be observed as they are deprived of use (in such cases). Cremation by a different fire is mentioned by *Vriddha Yajnavalkya*. "An *Ahitagni* should be duly cremated with three (sacred) fires.[3] One (a house-holder) who is not an *Ahitagni* with one fire[4] and others with secular fire." And fire and wood should not be caused to be
[*722] carried to the burning-ground[5] by a Sudra. Because *Yama has declared : "He for whom a Sudra carries fire, grass, wood and oblations will always remain with the dead (without being gathered to the manes) and will be covered with sin." So cremation should be performed after washing (the corpse) as it is said in the Smriti that one should cremate a corpse washed and decked with fine perfumes and wreaths. *Prachéthas* has also said: "The corpse

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1. Manu, Ch. V., S. 70.
2. i.e., a Brahmin who has kept the sacred fire perpetually in a family:—Ed.
3. i.e., the Garhapatya, Dakshinagni and Ahavaniya.
4. Angrasanagni. 5. i.e., where the person who died is a *dvija*.

should be caused to be washed (first), then it should be honored with cloths, etc., by sons and others. One should not cremate a corpse naked but should always leave something as a gift." By (saying) "*something as a gift*" the meaning is one should leave a portion of the cloth of the corpse to be given to those who live in (and are in charge of) the burning-ground.

A detail has been laid down by Manu in the matter of carrying a corpse,[1] "One should not cause a Brahmin's corpse to be carried by a Sudra while his relations are available. The oblation which is tainted by the contact of a Sudra is not conducive to the attainment of heaven." Here no stress should be laid on the words 'while his relations are available' as there is mention of the defect (or fault) of its not leading to heaven, etc. "One should carry (the corpse of) a deceased Sudra by the southern gate of the town and of the *dvijas* (or twice born) by the western, northern and eastern gates respectively."[2] So also *Harita*: "People should not carry a corpse with its face to the village." If, in the case of death abroad, the body is not available, an image (or figure) should be made from the (i.e., his) bones and even if they (i.e., the bones) are not available an image should be made in the manner described in the *Saunaka* and other *Grihya* rituals from the stalks of *parna*[3] leaves and the cremation ceremony should be performed (with reference to such image). And the impurity here is of the duration of 10 days and so on, because of the text of *Vasishta*[4] that if an *Ahitágni* dies abroad, the cremation ceremony should be again performed and the impurity is the same as in the case of (cremation of an actual) corpse. In the case of one (deceased) who is not an *Ahitágni* three nights (is the period of impurity). The image should (in his case) be made of flour well mixed with water and should be cremated by the kinsmen after saying 'Let him be an oblation to heaven' by reason of the text (or passage) :—" Thus having cremated the image of stalks of *parna* leaves, he remains impure for three nights."

* The meaning (or summary of what has been stated) is this :— [*723]
Before a name has been given to the deceased, burial only and no offering of water and the rest. Afterwards till three years of age cremation and offering of water are optional. After that till *Upanayana*, cremation and offering of water should be necessarily

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1. Manu, Ch. V, S. 104.
2. Manu, Ch. V, S. 92.
3. A kind of tree called also *Palasa*.
4. Vasishta, Ch. IV, S. 36.

performed but without mantra. (It is compulsory) in the case also of one whose tonsure has been performed before three. After *Upanayana,* however, after cremating in the mode prescribed for an *Âhitâgni,* all the exequial rites should be observed. But there is a distinction. In the case of one who has been invested with the sacred thread, cremation should be with secular fire. In the case of one (i.e., householder) who is not an *Âhitâgni* cremation should be with the *Grihya* fire and there should be also such an arrangement of the vessels as may be possible.

The author now describes what should be done after the *Samskara* (here, cremation).

3. Before the seventh or tenth day, the kinsmen approach the water facing the direction of the sky appropriate to the manes (i.e., south) and reciting the Mantra, "Blaze up, O fire, and destroy our sins etc.[1]"

Within "the seventh or tenth day the kinsmen" (Jñatis,) *i.e.*, the *Sapindas* and *Samanodakas* who are of the same *gotra* (as the deceased) approach the water facing the south and reciting the *Mantra* "Blaze up, O fire, and destroy our sins, etc." By approaching is meant approaching accompanied by the offering of water which is the object of such approach, because we find the rule about offering of water subsequently[2] extended to the maternal grandfather, spiritual preceptor, etc. And this (offering of water) should be made on odd days as *Gautama* has said[3]: "The offering of water (should be made) on the 1st, 3rd, 5th and 7th days." And this should be done after ablution (bathing) as it is stated in the *Satatapa* Smriti: "After committing the body to the flames, they approach the water without looking back (on the corpse)." So special rules have been laid down even by *Prachêtas* : "The kinsmen of the deceased should enter the water in the order of seniority (of age) should not jostle (each other) and with their *cloths represented by the holy threads*[4] passing from over the
[*724] right shoulder to the left side should on the water's * edge make an offering of water (to the manes of the deceased) facing the south, north, or east, as the case may be, in the case of Brahmins, Kshatriyas, and Vaisyas, respectively." In another Smriti the repetition of the offering of water has been stated (to be necessary) on all those days during which the impurity lasts. As Vishnu says[5] :

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1. Taittiriya Aranyaka, Prapataka VI, Anuvaka 10.
2. See the next Sloka, *i.e.*, Yajnavalkya, Ch. III, S. 4.
3. Gautama, Ch. XIV, S. 40.
4. Another possible meaning for the passage in italics is "holy threads and cloths."
5. Vishnu, Ch. XIX, S. 13.

" As long as the impurity lasts, they should offer water and *Pinda* (i.e., a ball of rice) to the deceased." So it has been stated by *Prachetas* also : " Day after day one should offer to the deceased handfuls of water. An increase should be made in the number (of such handfuls) till the *pinda* becomes complete." The meaning is that the number of handfuls should be daily increased till the tenth *pinda* is completed. Though the object of the Sastra is accomplished by the observance of either of these two alternative rites, one smaller and one greater yet it must be supposed that a superiority of benefit accrues to the deceased (from the greater rite) as (otherwise) a disposition to perform the greater rite which is more irksome would be unlikely and there would be the danger of the ordinance as to the greater rite becoming nugatory. A detail has been laid down by *Vasishta* [1]: " They should offer the libation of water with the left hand placed over the other."

The author now declares the extension, to the maternal grandfather and others who are not of the same *gotra*, of the libation of water which is distinguished by being offered only once and by other details as to the mentioning of the name, *gotra* and the rest which will be hereafter described.

4. Thus (should be made) the offering of water to maternal grandfathers and spiritual preceptors deceased. To companions, to women who have been given away (and thus gone out of the family), to the sons of sisters, to fathers-in-law and to sacrificial priests, the offering is optional.

The libation of water should be offered as a matter of course (or necessarily) to maternal grandfathers and spiritual preceptors deceased, just as it is given to *sagotra sapindas* deceased " **Companions**," *i.e.*, friends. " **Women given away**," *i.e.*, married, such as daughters, sisters, etc. " **Svasriya**," *i.e.*, sisters's son. **Father-in-law** is a well understood term. " **Sacrificial priests**," *i.e.*, those who assist at a sacrifice. To the companions and others deceased, the libation of water is optional. Optional libation of* water, *i.e.*, offering of water at one's pleasure. If there is a desire for the welfare of the deceased, water should be offered and it need not be offered if there is no such desire. The meaning is that there is no sin in omitting to do it. [*725]

The author now lays down a subordinate rule (Gunavidhi) as to the mode of offering water.

5. Once they offer the water silently (with mention) of the name and the Gotra.

1. Vasishta, Ch. IV, S. 36.

And the offering of water should be made thus. The *sapindas* and the *samanodakas* should become silent [1] and pronounce the name and *gotra* of the deceased and offer water only once saying, ' Let the deceased of such and such name and of such and such *gotra* be satisfied.' Or they may do it thrice because of the text of *Prachetas* that one should offer thrice saying each time ' Let the deceased be satisfied.' The daily increase of handfuls has been already stated (on account of the text of *Prachetas*). So the following detail also has been laid down by the same (Smriti writer). " Going to the bank of a river, and having cleansed himself properly, he should first wash his cloths, and then take a bath; having bathed with his cloths on, he should take a stone and pure in body and devout in mind, he should offer 10 handfuls in the case of a Brahmin, 12 in the case of a Kshatriya, and 15 in the case of a Vaisya. To a Sudra 30 handfuls should be offered. He should then enter his house. Ablution (Bathing) should be again undergone and he should cause the house to be purified."

The author now lays down a prohibition of the offering of water by some among the *sapindas*.

Those who are Brahmacharis shall not make the offering of water; likewise, the degraded.

Notwithstanding the existence of relationship *Brahmacharis* till *Samavartana* and degraded persons, *i.e.*, those who have lost their fitness for the duties of the twice-born classes should not make the offering of water and the rest. After the period of *Brahmacharya*, he should make the offering of water to, and observe impurity on account of, those *sapindas*, etc., who died before (*i.e.*, during his period of *Brahmacharya*). As Manu says: [2] " An *Adishti* should not make an offering of water till the completion of
[*726] his vow. *After completion she makes an offering and remains impure for three nights." *Adishti* signifies a *Brahmachari* or religious student as the rules [3] " though art a *Brahmacharin*, sip water (as prescribed for *Achamana*,), perform the rites (prescribed), do not sleep by day," etc., are enjoined (for the *Brahmacharya* stage of life). And this rule, the author will hereafter declare to be applicable only to persons other than parents and the rest in connexion with the text [4] ' the spiritual preceptor, parents and teacher, etc.' My preceptor (probably *Viswarupa*), however, expresses the following opinion:—An *Adishti* is one who has undertaken some expiatory rite. The prohibition of offering of water, etc., applies only

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1. i.e., Should not speak on other matters.
2. Manu, Ch. V, S. 88.
3. Aswalayana Grihya Sutra I, S 22.
4. Yajnavalkya, Ch. III, S 15.

to such a person and the rule about offering of water and about impurity applies after completion of the vow which consists in (here, in the resolution to perform) the expiatory rite. So the right to offer water has been prohibited to impotent people, etc. Because it has been declared by *Vridha Manu* : "Impotent people and others, thieves, *Vratyas*, and men who do not conform to the rules of morality and religion should not make the offering of water. So also women who are guilty of fœticide, those who seek injury to their husbands and women who are addicted to liquor."

Having mentioned the prohibitions as regards the class of persons who may not offer the libation of water, the author proceeds to lay down to whom the libation of water should not be offered.

6. Heretics, men who have not embraced any order, of life, thieves, women who murder their husbands, dissolute women and others, women addicted to liquor, and women who commit suicide, are not entitled to the observance (by relations, etc.) of impurity or of the ceremony of offering of water.

"*Heretics*," *i.e.*, those who wear marks contrary to the *Vedas* such as human skulls and others. "*Men who have not embraced any order of life*," *i. e.*, those who though competent to do so, have not adopted any particular order of life. "Thieves," *i.e.*, those who steal gold and other precious things. "*Women who murder their husbands*," *i.e.*, those who kill their husbands. "*Dissolute women*," *i.e.*, women of loose lives. By the use of the words "*and others*" women guilty of fœticide and of the murder of Brahmins are also included. "*Women addicted* to liquor*," *i.e.* [*727] women who are given to drinking that liquor which is prohibited to them. "*Women who commit suicide*," *i.e.*, those who give up their lives by the use of poison or fire, or by drowning or hanging themselves, or by other means. These, *i.e.*, heretics and others, deserve neither the observance of impurity, to be mentioned hereafter, for 3 or 10 nights, nor the offering of water and other exequial rites. The word *Bhajana* means those who cause others to observe something (such as a rite or impurity). These never furnish an occasion to *sapindas* and others for (the observance of) impurity, etc. Hence the text is intended to point out that on the death of these persons, the offering of water and other rites should not be done by the *sapindas*. Here (i.e., in the text) with regard to the words "women addicted to liquor," etc., it has to be observed that

no stress is intended to be laid on the particular gender, because, gender is among the things which are not intended to be emphasized according to the saying "gender, number, place and time and the result (good or bad) of actions these five, those learned in *Mimamsa* declare, are not intended to be laid stress on."

P. S. SIVASWAMY AIYAR.

(*To be continued.*)

CRITICAL NOTES.

Kasim v. Ayishamma, I.L.R., 15 M. 60. *Limitation Act, Art.* 123. In this case *Parker* and *Wilkinson JJ.*, held that a suit by a Mahomedan for a share of the property of an intestate against the other sharers even though the plaintiff had remained in possession with the defendants jointly, fell within Art. 123 of the Limitation Act, and was consequently barred, having been brought more than 12 years from the death of the intestate. The decision appears to us to be questionable. We shall examine it at some length, as the meaning of the Article appears to us to have been misunderstood. We may state at the outset that we agree with their lordships that Art. 127 does not ordinarily apply to a suit between Mahomedans, for, unless by special custom, there can be no joint family in their case. To this extent we are in accord with the decision of the Allahabad High Court in *Amme Raham* v. *Zia Ahmad.*[1] [See also upon the same point *Mahomed Akram Shaha* v. *Avarbi Chowdrami*;[2] *Poyran Bibi* v. *Lakhu Khan.*[3] But see *Abdul Rahim* v. *Kirparam Doji*[4] following *Bavasha* v. *Masumsha*[5] and *Patcha* v. *Mohidin.*[6] Cf. *Bhavasad* v. *Paktmin.*[7] *Mahomedans* are held to come within the purview of S. 4 of the Partition Act IV of 1893. See *Sultan Begum* v. *Debi Prasad*[8]:—ED.] The decision in *Bavasha* v. *Masumsha,*[5] seems to have been arrived at without the attention of the court, having been drawn to the fact that the words of the Article as printed in the Act are 'joint-family [*728] *property' with the hyphen between the words 'joint' and 'family.' We cannot therefore speak of exclusion from the property of the joint family in the case of Mahomedans, ordinarily. The question then is, has Art. 123 any application? Art. 123 is as follows:— 'For a legacy or for a distributive share of the property of an intestate, 12 years from the time when the legacy or share is payable

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1. (1890) I.L.R. 13 A. 282.
2. (1895) I.L.R. 22 C. 954.
3. (1901) 7 C.W.N. 155 (157).
4. (1891) I.L.R. 16 B. 186 (189).
5. (1889) I.L.R. 14 B. 70.
6. (1891) I.L.R. 15 M. 57.
7. (1898) I.L.R. 23 B. 137 (140).
8. (1908) I.L.R. 30 A. 324.

or deliverable.' The question is, was the suit which their lordships had under consideration a suit for a distributive share of the property of an intestate within the meaning of the Article? A suit by one sharer against the other sharers of an intestate's property is not a suit for a distributive share; compare the use of the words 'distributive share' in Ss. 26 and 42 of Act X of 1865. The sharers sued have no duty cast upon them by the law to distribute it. It is the executor or administrator who is charged with the duty of administering the estate that has to distribute the shares. And the words of the third column of the Schedule, 'when the legacy or share becomes payable or deliverable,' make the meaning clearer. The words 'payable' and 'deliverable' relate respectively to 'legacy' and 'share.' In a suit for a share the time begins to run when the share is deliverable. We would draw attention to the use of the word 'deliverable.' The co-sharer who is sued has no duty to deliver the share to the plaintiff sharer. The share is deliverable by the executor or administrator. It seems therefore that the Article applies to a suit by a person claiming a share of an intestate's property, instituted against the administrator or other legal personal representative charged with the duty of administering the estate. Indeed if the meaning of the Article were as stated by the learned judges, there would be no necessity for the use of the words 'distributive,' or even of the words 'for a distributive share,' and 'payable or deliverable.' The Article would convey the same meaning if it stood thus, 'for a legacy or for a share, of a residue bequeathed by a testator, or of the property of an intestate, 12 years from the time when the legacy or share becomes *due*.'

The history of legislation in England and in this country tends to support the view we have put forward, 3 & 4, Wm. IV, Ch. 27, S. 40 (now re-enacted in 37 & 38 Vic. Ch. 57, S. 8) enacted *inter alia* that, 'no suit shall be brought to recover any legacy but within twenty years next after a present right to receive the same shall have accrued to some person, etc.' A suit by a devisee of land for the recovery of it against the heir, for example, fell within S. 2 (now re-enacted in 37 & 38 Vic. Ch. 57, S. 1) of that statute. A legacy, however, the right to which as against an executor possessing sufficient assets of the testator, to satisfy it, has accrued, but is not sued for as a legacy out of such assets within twenty years after-*wards will be lost, see *Sheppard* v. *Duke*,[1] and *Christian* v. *Devereux*.[2] A share of residue bequeathed by a will was held to be a legacy within the words of S. 40 above quoted *Prior* [*729]

1. (1839) 9 Sim. 567: 59 Eng. Rep. 477.
2. (1841) 12 Sim. 264: 59 Eng. Rep. 1133.

v. *Horniblow.*[1] The statute 23 & 24 Vic., Ch. 38, S. 13 extended the scope of S. 40 already referred to, to 'suits for the recovery of the personal estate or any share of the personal estate of any person dying intestate, *possessed by the legal personal representative* of such intestate.' As under the English law the personal estate vests in the executor or administrator of the deceased, the person possessed of the personal estate as the legal personal representative is the executor or administrator, and the section enacts that in actions against him for a share of personal estate the limitation prescribed shall apply. The action by a devisee of land, (there are no sharers under the English law of the real property of an intestate), fell as before under S. 2 of 3 & 4, Wm. IV, Ch. 27. In this state of the law in England, Act XIV of 1859, was enacted in this country which by Cl. 11, of S. 1 provided for suits for a legacy; but it was Cl. 12, which speaks of 'suits for the recovery of immoveable property or of any interest in immovable property,' that applied to a suit for a share in immovable property left by an intestate; see *Treepoorasoondery Dossee v Debendronath Tagore.*[2] Art. 122 of Act IX of 1871, adopted the enlarged interpretation put upon the word 'legacy' in the English Act so as to include a share of the residue, (vide *Tre-poorasoondery Dossee* v. *Debendronath Tagore*[2] and the addition made by 23 & 24 Vic., Ch. 38, S. 13.) It runs as follows. 'For a legacy or for a distributive share of *the movable property* of a testator or an intestate.' The Indian legislature dropped the words 'possessed by the legal personal representative of such intestate,' and it appears to us that the sense of those words was retained when, in speaking of the time from which the period was to run, it said 'when the share becomes deliverable,' *i.e.*, by such legal personal representative. Act XV of 1877 made a further advance. It improved the wording of the Article and ommitting the word 'movable' extended its scope to suits for shares of immovable property as well. The improvement consisted in using the words 'for a share of the residue bequeathed by a testator' instead of the words 'for a distributive share of the movable property of a testator.' But it does not appear to us that any further change was contemplated, so as to include suits against co-sharers for a share of an intestate's immovable property. The inclusion of suits for a share of immovable property was necessitated by the Indian Succession Act, S. 179, which vests the property of an intestate whether movable or immovable in the administrator who is charged with the distribution. This departure made by the Indian Succes-
[*730] sion Act from the English *law required the change in the wording

1. (1836) 2 Y. & C. Ex. 200. 2. (1876) I.L.R. 2. C. 45.

of the Art. 123 so as to include suits against administrators for a share of immovable property.

Any suit by an ordinary sharer of immovable property out of possession, against his co-sharers in possession, falls within Art. 144. The decision of the Privy Council in *Ramalakshamma* v. *Ramanna*,[1] is in support of this view. It follows that so far as the case under consideration of *Parker* and *Wilkinson JJ.* was one for a share of immovable property, it fell within Art. 144 of the Limitation Act; but as the possession was not adverse according to the finding of the courts, the suit was maintainable.

Turning to the decisions and the opinions of text writers on the meaning of Art. 123, we find that our view receives support. Mr. Mitra says in his notes on this Article, 'The defendant in a suit under Art. 123 is the executor or administrator of other *representative* of the estate of the deceased; and the plaintiff claims the property as a legacy or distributive share.' Dr. Whitely Stokes writes in his Anglo-Indian Codes, 'This Article applies only where the legacy or share is sought to be recovered *as such from a person bound to pay it,* because he represents the estate of the deceased testator or intestate.' In *Issur Chunder Doss v. Juggut Chunder Shaha*,[2] which was a suit by the purchaser from a legatee of movable property bequeathed to him, against a person in possession of it under an order of court subsequently cancelled, *White* and *Macpherson JJ.* held that 'Art. 123 applied only to cases in which the property sought to be recovered as such from a person who was *bound by law to pay such legacy* either because he was the executor of the will or otherwise represented the estate of the testator.' [See also *Umardaraz Ali Khan* v. *Wiliyat Ali Khan*[3]: —ED.] In *Sithamma* v. *Narayana*,[4] *Muthusami Aiyar* and *Parker JJ.* held that a suit by one of the daughters to recover her ⅓ share of her mother's movable *Stridhanam* property in possession of the son after the death of the mother did not fall within Art. 123, as it was applicable only to cases in which the defendant *lawfully represented* the estate of the deceased. Even treating the son as an executor *de son tort,* their lordships refused to apply Art. 123. Whether they are right or wrong in this, as to which, see *per contra* *Webster* v. *Webster*,[5] we think the decision would have been the same even if the property had been in the possession of the other daughters entitled to share with the plaintiff, instead of the son whose possession was tortious.

1. (1886) I.L.R. 9 M. 482.
2. (1882) I. L. R. 9 C. 79.
3. (1896) I. L. R. 19 A. 169 (170).
4. (1889) I. L. R. 12 M. 487.
5. (1804) 10 Ves. 93 : 32 Eng. Rep. 778.

It seems to us therefore that the words 'suits for a distributive share of the property of an intestate' in Art. 123 apply only to claims [*731] *against administrators, who, as under the Indian Succession Act, are charged with the duty of administering the estate of the deceased. The construction put upon the Article by the learned judges of the Madras High Court would render it unsafe for the heirs of a Mahomedan to enjoy the property of the deceased, together, as one of them turned out of possession more than 12 years after the death of the intestate cannot maintain a suit for his share of the property. Such a result could hardly have been within the contemplation of the legislature when Art. 123 was enacted. [The Madras High Court in a recent Full Bench case decided that the proper Articles applicable were 120 and 144 according as the property was moveable and immoveable. Under the Mahomedan Law in the case of an intestacy the estate vested in the heirs as tenants in common. Art. 123 which presupposed a legal duty on the part of the defendant in possession to make a distribution cannot be applicable to such a case. See *Khadersa Hajee Bappu* v. *Ayissa Ummah*:[1] —ED.].

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* NOTES OF INDIAN CASES.

[*758] **Yesu Ramji Kalnath** *v.* **Balkrishna Lakshman,** I.L.R., 15 B. 583. Adverse possession is treated with exceptional indulgence by the Indian Limitation Act in the case of those who purchase property from trustees and mortgagees. At the expiry of 12 years from the date of the purchase, the right of the owner to recover possession against the purchaser becomes barred. *Bona fides* is not necessary in the purchaser to entitle him to the benefit of the article, but the purchase must be of the absolute estate and not of the mortgage right.[2] In the words of the Privy Council in *Radanath Doss* v. *Gisborne*,[3] "It (*i.e.*, purchaser) cannot be a person who purchases a mort- [*759] gage as a mortgage, because that would be *merely equivalent

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1. (1910) 20 M.L.J. 288.

2. After the decision of the Judicial Committee in *Abhiram Goswami* v. *Shyama Charan* (1909) I.L.R. 36 C. 1003 (1014 & 1015) it is not useful to refer to the Indian cases which held the other way. A few of them, however, may here be given. See *Behari Lal* v. *Mahammad Muttaki* (1898) I.L.R. 20 A. 482 Per *Banerji* J. at pp. 489, 490. But see *Aikman J. contra* at p. 492. See also *Husain Khunan* v. *Husain Khan* (1907) I.L.R. 29 A. 471 at p. 478 where the court holds that the view that a mortgagee is a purchaser within the meaning of Art. 134 is well-settled law; *Maluji* v. *Vithu Fakirchand* (1896) I.L.R. 22 B. 225; and *Manavikraman* v. *Ammu* (1910) I.L.R. 24 M. 471. But see contra *Pandu* v. *Vithu* (1894) I.L.R. 19 B. 140; per *Davies* J. in *Manavikraman* v. *Ammu* supra:—ED.

3. (1874) 14 M.I.A. 1 (16).

to an assignment of a mortgage; it would be the case of a person taking a mortgage with a clear and distinct understanding that it was nothing more than mortgage. It, therefore, must mean, in their lordship's opinion, some person who purchases that which *de facto* is a mortgage upon a representation made to him, and in the full belief that it is not a mortgage, but an absolute title." It is perhaps difficult to see the distinction between this definition of a *purchaser* as laid down by their lordships, and a *bona fide* purchaser. The Bombay judges were of opinion in *Yesu Ramji Kalnath* v. *Balakrishna Lakshman*[1] that *bona fides* were not necessary for the application of the article, and said that the Privy Council meant by a purchaser, 'a purchaser of the absolute title as distinguished from a mere assignee of the mortgage.' But the definition of their lordships involves an absence of notice that what is purchased is only a mortgage right. Possibly a distinction may be made that *bona fides* require that the purchaser must make reasonable inquiries about the title of his vendor, while actual absence of knowledge that the title is only a mortgage right will be enough to give one the benefit of the article. The Bombay High Court decided in the case under notice that the expression 'purchaser' includes a mortgagee, following an unreported decision of the Madras High Court. A somewhat difficult question may arise in connection with the article. Suppose a mortgagee for a term of 30 years sells the property as his own, can the mortgagor sue the vendee before the expiration of the mortgage term? Could not the vendee plead that his title is good for the term of the mortgage although he purported to buy a larger estate? Can the mortgagor wait till the time fixed in the mortgage-deed expires? Would he not then be met by the answer that he was barred at the end of 12 years from the mortgage? The question actually arose in the Madras High Court in S. A. No. 492 of 1890. The court, *Muthusami Aiyar* and *Parker JJ.*, held the mortgagor was entitled at once to sue the vendee.

Krishnanath Narayan v. Atmaram Narayan, I.L.R., 15 B., 543. *Sarjent, C.J.*, and *Bayley, J.*, held in this case that the rule that a bequest to a class, some of whom are not alive at the death of the testator, cannot take effect even with regard to those who are alive at his death, does not apply to a case where what is bequeathed to the class is the right to live in a house. The principle underlying the rule invalidating such bequests, is that the benefit to be enjoyed by each of the class is not definite at the date of the bequest, it is to be ascertained at a future time with reference to

1. (1891) I.L.R. 15 B. 583.

the number of persons composing the class. It will not apply therefore to 'the right to live' when the benefit to be enjoyed by each of the donees does not depend on the number of persons in the class, but is a distinct and independent right. Their lordships expressed no opinion on the point whether the rule in question applies at all to gifts and bequests by Hindus.

Patel Vandravan Jekisan *v.* Patel Manilal Chunilal, I.L.R., 15 B., 565. The theory of *bona fides* in adoption by a Hindu widow enunciated by the Privy Council in the *Ramnad*
[*760] *Case.*[1] has been correctly *understood by few and has commanded the approval of fewer still. The Madras High Court applied it in *Rajah Vellanki Venkata* v. *Venkata Rama Lakshmi*,[2] but the Privy Council explained their previous judgment to mean, not that the adoption should be made by the widow *bona fide* with a desire to benefit the soul of her husband, but merely that the consent of the sapindas of the husband should be obtained by the widow honestly. There can of course be no doubt that consent to the adoption obtained by corrupt means is no consent and an adoption made with consent so obtained will not be valid in law. The Bombay High Court held in the case under notice that the fact that the adoption took place during the last illness of the widow, shortly before her death, on an inauspicious day, eight years after the death of her husband, does not show that the adoption was not made *bona fide*. They held that a widow in making an adoption must be presumed to do so from proper motives. It is submitted that the correct rule is, that where the widow has the right to adopt, and the consent of the sapindas, where necessary, has been obtained, the courts ought not to go into the motive of the widow at all in making the adoption. It is contrary to ordinary principles of law to do so, and an inquiry into her motive must in the large majority of cases be both difficult and irksome.

[It will be found that in Bombay Presidency there has been a gradual leaning to the view that the presumption is irrebuttable. In *Mahabaleshwar* v. *Durgabai*[3] while the question was left open it was held that the fact that the motives of a widow were of a mixed character (as that the widow made terms for herself with the natural father) would not rebut the presumption. In *Bhimawa* v. *Sangawa*[4] that the fact made the adoption with the object of defeating her co-widow's claims to share did not render the adoption invalid. In *Ramchandra* v. *Mulji Nanabhai*[5] it was held by a Full

1. (1868) 12 M.I.A. 397.
2. (1876) I.L.R. 1 M. 174.
3. (1896) I.L.R. 22 B. 199.
4. (1896) I.L.R. 22 B. 206.
5. (1896) I.L.R. 22 B. 558.

Bench that in the Bombay Presidency the motives of a widow having the power to adopt were irrelevant. Per *Candy, J.* in *Lakshmibai* v. *Sarasvatibai*[1] :—ED.]

The case laid down also that in the Bombay Presidency, where the consent of the husband is presumed, the fact that the husband is in law a minor, is no ground for not making the presumption. The question is merely whether the deceased husband had attained the age of discretion, and if he had done so, the presumption will arise.

The court held also that the statement of a person as to the existence of a public custom is not admissible under Cl. 4 of S. 32 of the Evidence Act (when his evidence cannot be procured without great delay or expense), when the existence of the custom is not merely a relevant fact, but a fact in issue, S. 32 permitting such evidence only when it relates to a 'relevant fact.' It is difficult to see why the evidence should not be admissible as much in the one class of cases as in the other. The reason of the rule seems to apply equally to both classes of cases. We are slightly inclined to doubt the correctness of the decision.

Appu *v.* **Raman,** I.L.R. 14 M., 425. Clause (b) of S. 56 of the Specific Relief Act prohibits the granting of an injunction " to stay proceedings in a court not subordinate to that from which the injunction is sought." *Parker* and *Wilkinson JJ.* held that the clause is not applicable where a party seeks to restrain another from executing a decree, if no application for the execution has yet been made. The expression 'proceedings' means 'pending proceedings' and when no steps have been taken to execute, the injunction against execution is not one to stay proceedings. The injunction sought was to restrain execution of a decree of a Munsif confirmed by the District Court, and the suit for injunction was filed in the Subordinate Court. Their lordships might have disposed of the objection on the ground that the court to execute the decree being the Munsif's Court, although the final decree *itself was one of a superior court, the proceedings, if any, to be stayed, would be proceedings of an inferior court and the section had no application. [*761]

Karunakara Menon *v.* **Secretary of State for India,** I. L. R. 14 M. 431. The reporter's head-note in this case leads us to expect a great deal more than we find in the judgment. It tells us for instance that the case decided that where an original

1. (1899) I.L.R. 23 B. 789 at p. 799.

grant by the Government has been lost, the contents of the grant may be proved by a translation produced from official custody, and certified by the Collector to be correct and attested by the Government translator. In the judgment however we find no such thing. The learned judges lay down that the document being alleged to be more than 100 years old, it might be presumed to be lost, and they held there was such a parvana because the alleged grantee had himself relied on it more than once and actually produced it once before the Collector. The head-note tells us also that the court decided that Government was entitled to cancel an Inam patta granted to the Inamdar, as the plaintiff, the Inamdar's assignee was aware that the patta granted larger rights than the Inamdar was entitled to. We find however from the report that the courts did not decide the point. The learned judges held that the original grantee of the Inam had no power to alienate it beyond his own lifetime and he having died, the Government was justified in resuming the Inam.

The question did no doubt arise whether even if the Inam was attached to the office of Kazi, the Government could cancel the patta they granted to the Inamdar as a personal Inam in ignorance of the facts of the case. But the court did not decide it, and the reporter is wrong in saying that it did.

There was however one question of some importance which the learned judges did decide. They held that the East India Company as owner, under a grant from the Nabob of 1763, of the Jaghire in which the village was included, was competent in 1779, to alter by an act of state the terms of the grant of the Inam by the Nabob to the Inamdar in 1761. They relied on *East India Co.* v. *Syed Ally*,[1] where the Privy Council held that the treaty between the Nabob and the Company of the year 1801 vested the rights of sovereignty in the Company. But how this treaty of 1801 can show that an act done in 1779 could be justified as an act of state in 1779 is rather difficult to perceive.

SUMMARY OF ENGLISH CASES.

Clarke v. Ramuz, 1891, II Q. B. 457.

Sale of Land—Vendor in possession—Trustee—Preservation of property—Duty to take reasonable care—Removal of surface soil—Waiver—No knowledge.

Where a vendor under a contract for sale of land keeps possession until completion and payment of the purchase-money,

1. (1827) 7. M. I. A. 555.

he is in the position of a trustee for the purchaser and bound as such to take reasonable care to preserve the property. See S. 55, cl. (e) of the Transfer of Property Act.

While a vendor so remained in possession, a trespasser without his authority or knowledge removed a portion of the surface soil from the *property. A conveyance was executed and completion of the sale took place, neither party being then aware of the removal of the soil. *Held* that as the conveyance could not operate as a waiver or release as the removal was unknown to them, the purchaser could maintain an action against the vendor for a breach of trust in taking no care to prevent such removal of the soil. [*762]

In re **Onward Building Society**, 1891, II Q. B. 463.

Company—Compulsory winding up—Subsequent Transfer —Court's jurisdiction to rectify by insertion in register.

Where there is a sale and transfer of shares in a company after a compulsory winding-up order, the transferee is not entitled to be registered as owner of the shares without the sanction of the court; but the court has power to order the rectification of the register of members by the insertion of such transferee's name though the exercise of that power is discretionary and such an order ought not to be made except under exceptional circumstances. Rectification was refused after a winding-up order in the case of a speculative transfer as such rectification was not shewn to be a benefit to the company or those interested in its assets.

Towerson *v.* Jackson, 1891, II Q. B. 484.

Mortgage—Subsequent letting by mortgagor—Mortgagee's notice to pay rent—Tenant remaining in possession—No attornment.

Where after a mortgage, premises were let by the mortgagor, *held* that the mere fact of the tenant remaining in possession after notice by the mortgagee to pay rent to him was no evidence of an agreement that he should become tenant to the mortgagee. *Evans* v. *Elliott*, [1] followed.

Hamlyn & Co. *v.* Wood & Co., 1891, II Q. B. 488.

Business of brewers—Mutual contract to sell and purchase all grains made by defendants for 10 *years sale of business by*

1. (1838) 9. A. & E. 342 : 112 E.R. 1242.

defendants to third party within period—No term in contract not to sell business.

The defendants who carried on business as brewers and the plaintiffs entered into a written agreement by which the plaintiffs agreed to buy and the defendants agree to sell, for ten years, all the grains made by the defendants, at certain rates. The defendants, sold their business after five years and consequently failed to supply grains to the plaintiffs. *Held* by the Court of Appeal that no term could be implied in the agreement that the defendants would not by a voluntary act of theirs prevent themselves from continuing the sale of grains to the plaintiffs for the stipulated period. Such an implication may be made, where considering the terms in a reasonable and business manes, it necessarily arises from the presumed intention of the parties for the purpose of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of the parties.

Reeves *v.* Butcher, 1891, II Q. B. 509.

Contract of loan—Loan repayable in five years—Option to creditor to call before period in case of default in payment of any instalment of interest—Suit more than 6 *years from date of first default—Limitation—Bar—*21 Jac. I, Ch. 1653.

On a loan by the plaintiff for five years with power to call in the same on defendant's default to pay any instalment of interest and the plaintiff sued for the loan more than six years from the date of the first default. *Held* that time began to run from the earliest time at which plaintiff could have brought the action and the suit was barred (S. 3 of 21, Jac. I, Ch. 16). *Hemp* v. *Garland*[1] approved.

Hall *v.* Hall, 1891, P. 302.

Divorce—Decree nisi for dissolution money paid by husband for wife's cost of original hearing—Unsuccessful appeal by wife —Jurisdiction of court to award husband's costs out of such fund—Lien of wife's solicitor—Lien not affected, unless solicitor's conduct was vexatious or hopeless.

The Court of Appeal has jurisdiction to order the husband's costs of an unsuccessful appeal by the wife against a decree *nisi* for dissolution of marriage at the suit of the husband, to be paid out of money which he has paid into court to defray the wife's costs

1. (1843) 4. Q.B. 519 : 12 L.J.Q.B. 134.

of the original hearing; but the court wil not make such order to the prejudice of the lien of the wife's solicitor unless he has so conducted himself as to justify the strong measure, as that he had acted vexatiously or oppressively in conducting what was a hopeless appeal.

Attorney General v. Chapman, 1891, II Q. B., 526.

Stamp duty in respect of personal property including property 'passing under any past or future voluntary settlement —Property appointed under power conferred by marriage settlement—Interest created under power.

Where stamp duties are imposed in respect of accounts delivered of personal property, including any property "passing under any past or future voluntary settlement" and property was appointed under a power conferred by a marriage settlement, *held* that the interest created by the power must be treated as arising under the deed creating the power.

Wiedemann v. Walpole, 1891, II Q. B., 534.

Breach of promise of marriage, action for—32 & 33 Vic. C. 68, S. 2—Letter by plaintiff to defendant—No reply by defendant —No corroboration of plaintiff's testimony.

In an action for breach of promise of marriage, the mere fact that the defendant did not answer letters written to him by the plaintiff, in which she stated that he had promised to marry her, was held no evidence corroborating the plaintiff's tstimony in support of such promise within the meaning of 32 and 33 Vic., Ch. 68, S. 2. Per *Bowen L. J*: silence is not evidence of an admission unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not. *Per Lord Esher, M. R*: there are cases—business and mercantile cases—in which the courts have taken notice that in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree. But such cases as those are wholly unlike the case of a letter charging a man with some offence or meanness.

Skinners' Co. v. Knight, 1891, II Q. B., 542.

44 & 45 Vic. C. 41, S. 14—Liability of lessee to pay compensation for breach of covenant—Costs incurred by lessor for

consulting and employing solicitor and surveyor for preparing notice.

The compensation for breach of covenant, which a lessee is liable to pay under S. 14 of 44 & 45 Vic., Ch. 41, does not include the loss incurred by the lessor in consulting and employing a solicitor and surveyor in respect of the preparation of the notice required by the section.

In the goods of Shepherd, 1891, P. 323.

Executors and solicitor of deceased testatrix refusing to give information as to previous wills—Direction by court to bring all wills—Applicants allowed to take copies.

Where the executors and the solicitor of a deceased testatrix had refused to give any information as to previous wills alleged to have been exeecuted by the testatrix to persons who believed themselves to have been benefited by them, the court ordered them to bring into the registry all wills of the deceased in their possession and to allow the applicants to take copies of them.

Metcalfe *v.* Melcalfe, 1891, III Ch., 1.

Will—Devise to children as tenants in common with benefit of survivorship—Transfer by act of parties or by operation of law of interest of any of the children—Provision, effect same as death—Bankruptcy of child—Forfeiture of interest to other children.

A tenancy in common with benefit of survivorship was created by a testator in favour of his children, of the rents and profits which the trustees of his real and personal estate in trust for that purpose, were to pay to them. The will also declared that if the interest of any of the children was transferred by act of parties or by operation of law, such interest should be applied among the others as in the case of death. One of the children becoming bankrupt before the death of the testator and after the date of the will, *held* that her interest was forfeited to the others although she became entitled to property within a year of the testator's death,
[*764] sufficient to pay the debts, as at the time that the income *had to be paid the bankruptcy had not been annulled. *Per Bowen, L. J*: that forfeiture clauses are to take effect in the case of a bankruptcy existing at the testator's death has been settled by a chain of authorities by which we are bound.

In re **Portuguese Consolidated Copper Mines Ld.,** *Ex Parte* **Lord Inchiquin,** 1891, III Ch., 28.

Company—Director to hold 40 shares—Shareholder appointed Director—Board allotted 40 shares without his application—Subsequent acting as Director on several occasions—Subsequent acquisition of 40 paid up shares—Director liable for the qualifying 40 shares.

A shareholder was appointed an original director of a company whose articles provided that each director should hold, at least, forty shares in the company. Forty shares were, without his knowledge and without any application on his part, allotted to him at a meeting of some of the directors, his name was placed on the register in respect of them, and he acted as a director on several occasions. He subsequently acquired also by transfer, forty fully paid up shares. *Held* by *North, J*: on a winding up, that his name was properly placed on the register in respect of the allotted shares at any rate from the time when he first acted as a director. *Held* also by the Court of Appeal that the shareholder must be taken to have known that it was his duty to qualify for the office of director by taking forty shares within a reasonable time and that such time had elapsed before the order for winding up, and that he was properly made a contributory in respect of those shares.

Hargreave *v.* Freeman, 1891, III Ch., 39.

Infringement of trade-mark, Injunction restraining—Trade-mark for entire class—User only on one description of goods—No right to all descriptions of goods in that class.

In an action for an injunction to restrain an infringement of a trade-mark, *held*, that a registration by the plaintiffs, of a trade-mark for an entire class followed by user on one description of goods only, did not give the exclusive right to the use of such trade-mark for all descriptions of goods in that class, and that under the circumstances the plaintiff was not entitled to the injunction.

In re **Schweder's Estate, Oppenheim *v.* Schweder,** 1891, III Ch., 44.

Legacy—Personal estate insufficient to pay all legacies—Abatement also of legacy to wife.

Where the personal estate is insufficient to pay all the legacies in full, a legacy to the wife must also suffer abatement. *Per Chitty, J*: mere relationship to the testator does not of itself give

a legatee any priority over other legatees. And a mere direction to pay legacy immediately is no evidence of any intention on the part of the testator to give priority to that particular legacy in case of a deficiency in the estate, because it is to be presumed that a testator intended all the legacies to be paid in full when he gave them.

In re **Johnson, Moore *v.* Johnson,** 1891, III Ch., 48.

Infant Settlement Act of 1855, *S.* 1—*Covenant—After-acquired property—Interest acquired by settlor under will—Expectancy.*

By virtue of S. 1 of the Infant's Settlement Act of 1855, an infant is enabled with the sanction of the court, to enter into a covenant to settle after-acquired property, and such a covenant will apply to an interest acquired by the settlor under the will of a person who dies after the execution of the settlement, such an interest being property in "expectancy" within the meaning of S. 1.

In re **Yates, Bostock *v.* D'Eyncourt,** 1891, III Ch., 53.

Will—Construction—Devise of real estate—Trustees to sell and stand possessed of proceeds upon trust for all and every my sons and daughters who shall be then living and the issue of any of them share and share alike—Sons and daughters and issue tenants in common—Issue among themselves joint tenants.

A testator devised real estate to trustees in fee, on trust during the lives of his sons and daughters or during the lives or life of all or any with their concurrence, to sell the property and to stand possessed of the proceeds "upon trust or all and every
[*765] my said sons and daughters who shall be then living, and *the issue of any of them dead (such issue, standing *inloco parentis*) share and share alike." *Held* that the sons and daughters and the issue of a deceased son or daughter (as representing their deceased parent), took as tenants in common, but that these not being words of severance, among the issue of a deceased son or daughter, such issue took as joint tenants *interse. Per North J:* when words of distribution occur only once there being two classes to take, those words apply to the first class only and not to the second.

In re **Wilks, Child *v.* Bulmer,** 1891, III Ch., 59.

Joint tenancy—Modes of severance—Application by one for payment of $\frac{1}{3}$*rd fund in court—No severance before order.*

An application by one of three joint tenants to the court for payment of one-third of a fund in court as he had attained twenty-one,

does not amount to a severance of the joint tenancy before an order is made. How a joint tenancy may be severed *discussed.*

NOTES OF CANADIAN CASES.

Huntingdon *v.* Attrill, 11 C. L. T, 38.

Foreign judgment—Penal action—No enforcement of foreign penal laws—Maintainability of action.

The courts of Canada will not indirectly enforce the penal laws of a foreign country, by entertaining an action founded on a judgment obtained in that foreign country in a penal action.

Sawyer *v.* Thomas, 11 C. L. T, 40.

Negotiable Instrument—Debt—Payment cheque—Duty of creditor accepting cheque—Presentment—Undue delay—Notification of dishonor.

Where a creditor accepts from his debtor the cheque of a third person he must without undue delay present that cheque for payment, and if it is dishonoured notify the defendant of the fact and claim recourse against him on the original indebtedness. Unless this is done the creditor must be taken to have accepted the cheque in payment of the debt, and the debtor is discharged.

Regina *v.* Petrie, 11 C. L. T, 43.

Offence—Criminal trial—Judge reserving judgment—Local inspection in prisoner's absence—Procedure unwarranted.

In a criminal case the judge who reserved his decision proceeded to inspect the scene of offence in the absence of the prisoner or any one in his behalf. *Held* that there was no authority for the judge taking a view of the place and his so doing was unwarranted, and that even if he had been warranted in taking the view, his doing so in the absence of the prisoner or of any one on his behalf was unwarranted.

McCormic *v.* Township of Pelee, 11 C. L. T, 44.

Highway, eaten by action of water in lake—Duty of Municipality—No erection of sea-wall—No duty to restore if ordinary repair ineffectual.

Where a highway running along the side of a lake had been eaten away by the action of the water, so as no longer to be

traversable: *held*, that the municipality were not called upon by law to restore it. The municipality were not bound to erect a sea-wall to keep off the action of the water, and without one, any ordinary reparation would be ineffectual.

Gould v. Erskine, 11 C. L. T., 47.

Action of seduction—Father absent—Mother in charge entitled to maintain suit.

The mother of a girl who had been living and doing service under her is entitled, in the absence of the father from the province, to maintain a common law action for seduction.

Chamberlain v. Thwaite, 11 C. L. T, 53.

Witness—Hearing adjourned next day—No duty to attend without payment for second day.

A witness is entitled to be paid for the second day after the adjournment on the first day and is not obliged to come back on the second day if not so paid.

[*766] ***Beatty v. Davis,** 11 C. L. T., 75.

Private land covered by navigable water—Owner duly entitled to fish, etc.—Extent of public right of navigation.

Ownership of land or water, though not enclosed, gives to the proprietor, under the common law, the sole and exclusive right to fish, fowl, hunt, or shoot within the precincts of that private property, subject to the game laws when pertinent. And this exclusive right is not diminished by the fact that the land may be covered by navigable water. The right of navigation when it exists is to be used so as not to unnecessarily disturb or interfere with the enjoyment of the subordinate private rights of fishing or shooting. The public can only use the water for the *bona fide* purposes of navigation, but not so as to occupy the water for the purpose of fishing or fowling when the soil underneath is the private property of one who objects to such occupation.

Reily v. City of London, 11 C. L. T, 79.

Negligence—Action for bodily injury—No power to order plaintiff to submit to examination by defendant's surgeon.

In an action to recover damages for bodily injuries caused to the plaintiff by the alleged negligence of the defendants: *held*, that

the court had no power to order the plaintiff to attend and submit to an examination of her person by surgeons chosen by the defendants.

Taylor *v.* Massey, 11 C. L. T, 105.

Evidence—Liberal action—Inputation against plaintiff—Surrounding circumstances, evidence of, admissible.

In an action for libel by the publication of a letter: *held* that the surrounding circumstances were admissible in evidence for the purpose of showing that persons conversant with those circumstances might naturally conclude that the plaintiff was the person aimed at by the latter; and it was enough that the circumstances and the libel taken together pointed to some one, and that the jury found the plaintiff to have been the person intended.

Regina *v.* McNamara, 11 C. L. T., 156.

Evidence—Attempt to procure woman to become common prostitute—General reputation of house, evidence of, admissible.

On an indictment for attempting to procure a woman to become a common prostitute, in corroboration of her evidence that for such purposes the prisoner had taken her to a bawdy house, evidence of the general reputation of the house is admissible.

Forsyth *v.* Canniff, 11 C. L. T., 156.

Municipal Corporation —Health Officer—No servant—Liability of Corporation for officer's acts.

Held that the medical health officer of a municipal corporation appointed under R. S. O. C. 205, S. 47, is not a servant of the corporation so as to make them liable for his acts done in pursuance of his statutory duties.

Martin *v.* Reginam, II C. L. T., 212.

Crown—Negligent acts of officer, liability for—Scope of employment—Railway, Child wrongfully in—Forcing child to jump off—Negligence.

1. The Crown is liable for an injury to the person received on a public work resulting from negligence of which its officer or servant, while acting within the scope of his duty or employment, is guilty. *City of Quebec* v. *The Queen,* 2 Ex. C. R., 252; *ante* p. 33, referred to.

2. One who forces a child to jump off a railway carriage while it is in motion is guilty of negligence.

3. The fact that the child had no right to be upon such carriage is no defence to an action for an injury resulting from such negligence.

See also *Brady* v. *Reginam*, in 11 C. L. T., 35.

[*733]

*JOTTINGS AND CUTTINGS.

Touts:—"*Employing 'touts'* to bring business to solicitors is so derogatory to the dignity of the profession that the publicity recently given to a case heard at the Brompton County Court and reported in our last issue, will, we trust, have the effect of checking, if not stamping out, this objectionable practice. Ignorant persons who sustain, or claim to have sustained, injuries in railway or omnibus accidents are the most common victims of the system; and many cases which would probably be settled out of court, if in other hands, result in costly and vexatious litigation. The most effective remedy is, after all, a sound and healthy professional opinion, and the Incorporated Law Society have a great responsibility in seeing that this is cultivated." This most objectionable practice, we are sorry to say, prevails in the town of Madras and in some of the more litigious districts of this Presidency like Tanjore and Madura. The extent to which it is carried on would lead one to believe that it was only a moral offence. The Legal Practitioners Act under which it is attended with penal consequences is openly set at naught. Nothing but a strong public opinion within the ranks of the profession can check this growing evil. We think it is time for an Incorporated Law Society to spring into existence, which should see to every offender of this class being properly punished and to the cultivation of a healthy sense of professional honour. The judges of the High Court will earn the thanks of all honourable members of the legal profession if they will help the formation of a body with powers and responsibilities like the Incorporated Law Society in England and the societies in America. —*The English Law Journal.*

Divorce in France and the United States:—The *Economiste Francais* publishes an interesting article comparing the recently compiled tables showing the number of divorces granted in France since the new law came into force, and in the United States and other countries during the same period. The French law of divorce came into force on August 1, 1884, and in the five months of that year 1,657 divorces were granted, the figures for the four

following years being 4227, 2949, 3636, and 4708. The statistics which have been published in France do not come down later than 1888, and in that year, according to the writer in the *Economiste Francais* there were 23,472 divorces in the United States, this being nearly 4000 more than were granted in France, England, Italy, Germany, Holland, Sweden, Norway, Austria, Roumania, and Canada put together. Comparing the divorces in France and *the [*734] United States with those of other countries, the following figures are given: Germany, 6161; Russia, 1789; Austria, 1718; Switzerland, 920; Denmark, 635; Italy 556; Great Britain and Ireland, 508; Holland, 339; Belgium, 290: Sweden, 229; Australia, 100; Norway, 68; and Canada, 12.—*The Law Journal.*

An incident of forensic interest in connection with the case of *Ryves* v. *The Attorney-General* was the following: Mr. Smith, in replying for the petitioner, said that 'he believed, on his word of honour as a gentleman, that the documents which Mrs. Ryves had produced'—but the Lord Chief Justice *Cockburn* interrupted him in a moment. 'I insist,' he said, 'on your not finishing that sentence. It is a violation of a fundamental rule of conduct, which every advocate ought to observe, to give the jury your personal opinion.'—*The Law Journal.*

The Disbarring of Barristers:—By statute the Incorporated Law Society in England is the Registrar of Solicitors, is entrusted with the examination of all persons wishing to become solicitors, has the custody of the Roll of Solicitors, and is entitled to notice of any application to strike the name of a solicitor off such roll, and the motion must be made to a committee of the council of such society in the first instance which hears and reports the same to the High Court of Justice.

To the Inns of Court, which are, it must be remembered, voluntary societies, likewise belong the powers of disbenching and disbarring their members, and their decisions in these matters are final and conclusive, subject only to an appeal to the Lord Chancellor and the judges as visitors.

In Ontario the Law Society of Upper Canada has by statute the right to call to the bar in that province and "the applicant can only be admitted through the doors of the Law Society to practise at the bar of the courts" therein.

Whenever any person, being a barrister or solicitor of the Supreme Court of Ontario ... has or may hereafter be found by the Benchers of the Law Society, after due enquiry by a committee of their number or otherwise, guilty of professional misconduct, or of conduct unbecoming a barrister or solicitor it shall be lawful for the

said Benchers in convocation to disbar any such barrister and to resolve that any such solicitor is unworthy to practise, etc.—*The Western Law Times.*

Law Reports :—Whenever reports are published by a barrister they are entitled to be received and cited as the findings of the court by which the decision is given. In the words of Lord Westbury "as soon as a report of any case is published with the name of a barrister attached to it, the report is accredited, and may be cited as an authority before any tribunal," and that learned Lord Chancellor effectually administered a rebuke to a bumptious judge who refused to act on the authority of a case cited from *The Jurist* when he said, referring to this class of reports, "it is of such materials that the law of England is made up, and I would be denying
[*735] *myself much valuable assistance in ascertaining what the law is, if I were to refuse to receive the citation of cases reported by barristers in these useful publications."

Privy Council Secrecy :—Sir Walter Phillimore writes to the *Times* as follows:—

In your issue of March 26 last appeared a letter from Lord Grimthorpe in which he recurred to the old controversy between the late Lord Cairns and the late Sir Fitzroy Kelly as to the obligation of secrecy in Privy Council judgments and very emphatically threw his weight in favour of Sir F. Kelly and against the supposed necessity of secrecy.

This seems to have led Lord Selborne to publish a pamphlet, which he has had long by him, in defence of Lord Cairns ('Judical Procedure in the Privy Council,' MacMillan and Co., 1891) which, as it came out on the eve of the long vacation, I had only an opportunity of seeing quite lately.

I happen, however, to have in my possession a collection of cases of which Lord Selborne appears to be entirely unaware—cases not of theological controversy, but of appeals from the Admirality and Prerogative Courts and from India, in which the language of the judges seems to me impossible to reconcile with the idea that there was any duty to be secret either as to the fact of division of opinion or as to the particular privy councillors who dissented.

In *Cooper* v. *Bockett*, in 1846, a will case on appeal from the Prerogative Court, part of the judgment (4 Moore's 'Privy Council Reports,' p. 452) is as follows:—

'One of their lordships, the Vice-Chancellor Knight Bruce, differs in this conclusion of law, but the rest of their lordships consider that this sentence must be reversed.'

In *Cowie* v. *Renfrey* (5 Moore), an Indian appeal decided in 1846, the judgment ends thus:—

'I must add, however that this is the judgment of the majority of their lordships, and that the Chancellor of the Duchy of Cornwall was inclined to have taken a different view of the case.'

In *Shersby* v. *Hibbert*, an Admirality appeal decided in 1847 (5 Notes of Cases, p. 470), the judgment is delivered by Lord Campbell, ending in the usual form:—

'Their lordships will, therefore, advise Her Majesty that the decree appealed against should be affimed,' etc. And the reporter immediately adds, at p. 478.:—

'Lord Brougham very emphatically declared his dissent from this judgment.'

In *Craig* v. *Farnall*, a clerical discipline case in 1848 (6 Notes of cases, p. 693) the judgment says:—

'On the whole we are of opinion that the evidence is insufficient to support this charge, and that the decision of the court below must be reversed. *This is the opinion of the majority of their lordships. We cannot avoid adding, and in this all their lordships are entirely agreed......' [*736]

In *Phillips* v. *Phillips*, 5 Notes of Cases, p. 440, a divorce case decided in 1847, Lord Brougham is, and in *Michell* v. *Thomas*, p. 614, of the same volume, a will case, both Lord Brougham and Lord Campbell are, reported as adding, at the end of judgments given by one of their colleagues observations, qualifying and limiting the principles of the judgment.

I have besides a great number of cases in which the fact of unanimity or of probable unanimity has been stated in the judgment.

Lord Selborne, I see (p. 42), admits that there are a good many examples of this 'to be found in the books.'.

But, if so, and if there is to be regularity in the form of the Privy Council judgments, either unanimity should always be expressed, or it should be supposed unless the contrary is stated.

If the latter, how monstrous it was, in the case of the importance of *Ridsdale* v. *Clifton*, not to allow the dissentient minority the right to have it stated that the judgment was not that of the whole body.

Why the statement in *Sheppard* v. *Bennett*, that the judgment on one point was not unanimous, why the statement in the *Gorham*-

Case that the Bishop of London and Vice-Chancellor Knight Bruce, mentioning them by name, dissented, and the similar statement in the 'Essays and Reviews' case that the two Archbishops dissented are permissible, and yet it was a breach of Sir F. Kelley's oath for him to declare his own dissent when the majority would not (as in other cases) declare it for him, are questions for which your readers will look to Lord Selborne's solution with interest.

My contribution to your columns is only intended to take a humbler form—that of precedents of publicity *versus* secrecy.

I may just add, as Lord Selborne refers to the undoubted fact that the delegates giving no reasons for their judgments also did not officially and publicly state any division of opinion, that he will find judicial notice taken of the fact that a delegate's decision was the judgment of 'a narrow majority' in *Cockcroft* v. *Rawles*, 4 Notes of Cases, p. 249.

On the above, *the Law Journal* says:—There are strong and obvious reasons against the present practice. In the first place there is the appearance where there perhaps is not the reality of unanimity. The judgment may not be 'the judgment of their lordships,' but that of three weak judges as against that of two strong ones. Then there is an inevitable loss of individuality in a common judgment, and the arguments and considerations which may actuate a vigorous-minded judge are not likely to emerge in a decision framed to suit the opinions of the whole or of the majority. There is a temptation to acquiesce in the language of some one member of the committee, and perhaps in his ideas, on the part of indolent men, who satisfy themselves by simply coming [*737] to a conclusion on the matter in hand, without *careful analysis or argument. Again, law is not final; it is, and ought to be, subject to the development of knowledge and sentiment. A decision of the Privy Council or the House of Lords may be undermined and its effect overruled in progress of time. Improvement can best be effected when each man's contribution to the progressive movement is made known to the world. There is also an argument of a technical character. The decisions of the Privy Council are not strictly judgments, but advice tendered to Her Majesty. Cases are imaginable in which it might be expedient for the Queen—especially in constitutional questions arising in India or the Colonies—to disregard the advice so given. Such a step would be clearly made less dangerous if it were in accordance with the opinion of a minority of the Council whose ability and reputation were higher than those of the majority.

Hypnotic Suggestion.—The question whether crime can be committed under the influence of hypnotic suggestion is seriously dividing medico-legal opinion at the present moment. According to the Nancy School, this question must be answered in the affirmative. At the recent meeting of the Psychological section of the British Medical Association, Dr. Voisin, of the Saltpetriere, Paris, read a paper on this subject, in which he cited the case of a patient who, acting on his suggestion and in the presence of three magistrates, stabbed a 'dummy' woman with a real knife. According to another view, of which Professor Benedikt, of Austria, is the most illustrious exponent the power of the hypnotist over his patient will probably end if he really attempts to urge him to the commission of crime. It must be confessed that this *a priori* way of dealing with the matter is not altogether satisfactory, although it is obvious that the fact that a person under hypnotic influence can be induced to stab a 'dummy' by no means proves that he would go the length of committing murder in obedience to the hypnotic suggestion. On this point there will be no dispute—namely, that the British Medical Association has done well in recommending the legislative regulation of hypnotic exhibitions.

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